Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems

MICHAEL H. LEROY* & PETER FEUILLE**

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* Professor, Institute of Labor and Industrial Relations, College of Law at the University of Illinois at Urbana-Champaign.

** Director and Professor, Institute of Labor and Industrial Relations, University of Illinois at Urbana-Champaign, and member of National Academy of Arbitrators.

I. THE PARADOX OF JUDICIAL REVIEW OF LABOR AND EMPLOYMENT ARBITRATION AWARDS

A. *Introduction*

Private forms of workplace arbitration are more prevalent than ever. In unionized work settings, labor arbitration provides employers and unions an indispensable method for adjusting their relationship. Until recently, most nonunion firms provided no arbitration for employment disputes.[1] In the past few years, however, many employers have adopted employment arbitration.[2]

This development has generated much more controversy than the labor-management model.[3] Critics charge that the newer model, which forces employees to forgo access to courts in return for access to arbitration, is strongly biased in favor of employers.[4] On the other hand, employees face serious obstacles when they seek to adjudicate legal claims arising out of their

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[1] An estimate of the use of arbitration by nonunion employers as of 1990 appears in David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823, 824–25 (1990). *See also* GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION—MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (1995), WL GAO/HEHS 95-150 (GAO survey of 2000 businesses found that almost all firms with 100 or more employees used an ADR method).

[2] *See Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, 93 Daily Lab. Rep. (BNA) A-4 (May 14, 1997) (surveying 530 Fortune 1000 companies and finding that seventy-nine percent of employers use arbitration). *See also* Mei L. Bickner et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997, at 8, 78 (reporting a massive increase in the use of arbitration in nonunion workplaces following the Supreme Court's *Gilmer* decision in 1991).

[3] *See* Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d Cir. 1998) ("In the aftermath of *Gilmer* . . . mandatory binding arbitration of employment discrimination disputes as a condition of employment has caused increased controversy."). Arbitration of individual employment rights has led to concerns that it (1) is usually imposed upon employees, (2) precludes individuals from suing in court to protect their employment rights, (3) imposes unfair forum fees, (4) denies recovery for attorney fees, (5) offers arbitrators who are typically older white males with a possible predisposition to rule in favor of employers, especially in race and sex discrimination cases, (6) fails to screen arbitrators adequately to determine their qualifications, and (7) is biased by the repeat player effect.

[4] *E.g.*, Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635 (1995); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

employment. They may have difficulty obtaining counsel.[5] If they succeed in persuading an attorney to represent them in federal court, they face crowded dockets with concomitant delays, and long odds of ever receiving a verdict on the merits of their claims.[6] In response, Congress has amended key employment discrimination laws and fostered private dispute resolution systems to encourage use of alternative dispute resolution (ADR) methods, including arbitration.[7]

Our Article examines a paradox inherent in workplace arbitration systems.[8] This method is supposed to provide disputants a low-cost alternative to courts, permit them to select the arbiter, and adjudicate their cases quickly and efficiently.[9] To preserve these advantages, arbitrator awards should be final and

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[5] William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J., Oct.–Dec. 1995, at 40, 44. One survey of attorneys who represent plaintiffs in employment discrimination disputes found that respondents accepted five percent of the cases in which their legal services were requested.

[6] Statistical measures of this complex problem are reported by Susan K. Gauvey, *ADR's Integration in the Federal Court System*, 34 MD. B. J. 36, 41 (2001) (reporting that the rate of civil cases that go to trial in federal courts has steadily declined (8.4% in 1975, 4.7% in 1985, 3.5% in 1995, and 2.3% as of June 30, 2000)). *See also* Marika Litras, *Bureau of Justice Statistics Report on Civil Rights, Complaints Filed in U.S. District Courts*, 13 Daily Lab. Rep. (BNA) E–5, at E–10, E–15 (Jan. 20, 2000). A study of employment discrimination lawsuits in the federal courts found that the proportion disposed of by trial declined from nine percent in 1990 to five percent in 1998. This study also found that the median amount of time for processing an employment discrimination case from filing to trial verdict was eighteen months in 1998.

[7] *See* The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, 12212 (1994). *See also* The Civil Rights Act of 1991 (amending Title VII of the 1964 Civil Rights Act), 42 U.S.C. § 1981. Both acts encourage the use of arbitration to resolve disputes. Recent examples of ADR initiatives are The Civil Justice Reform Act, 28 U.S.C. § 471 (1994) (authorizing more ADR programs to be administered by federal courts to alleviate problems with cost and delay); the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (1999); and the Administrative Dispute Resolution Act, enacted in 1990, 5 U.S.C. § 571(a) (1999) (all federal agencies to implement ADR policies for internal disputes).

[8] *E.g.*, Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000). *See generally* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984) (an earlier publication that remains influential on this subject).

[9] Letter from the Office of Arbitration Services, Federal Mediation and Conciliation Service, to Arbitration Services Customers (Feb. 2001) (on file with authors) (reporting on measures of cost and efficiency from October 1, 1999 to September 30, 2000). On average, FMCS arbitrators charged a daily rate of $672, fees of $2,863.49, and expenses of $321.67. *Id.* at 2. The average total charge to a union and employer was $3,185.16, *id.*, which the parties typically split on an equal basis. FMCS requires arbitrators to contact the parties within fourteen days to set a hearing date. Regulations also require that arbitrators make awards no later than sixty days from the date of the closing of the record as determined by

binding. If a sore loser at arbitration succeeds in having a court vacate an award, this breaches the promise made by the disputants to abide by the arbitrator's ruling. This logic implies that courts should play no role in reviewing arbitration awards.

Imagine, however, that courts never reviewed an arbitrator's ruling or that they carried out such perfunctory reviews that every appealed award was confirmed. The Supreme Court considered this in 1960 when they decided the *Steelworkers Trilogy* (the *Trilogy*). Following its theory in *Lincoln Mills* that Congress created federal jurisdiction to fashion a common law to enforce labor agreements,[10] the Court set forth standards for judicial review of the labor arbitration process in the *Trilogy*.[11] If arbitration lacks this external constraint, what prevents an arbitrator from exceeding her authority, or imposing her own brand of industrial justice? What if her award fails to draw its essence from the agreement? If courts cannot vacate problematical awards, arbitrator misjudgments cannot be corrected. This, too, breaches the parties' agreement. Even if these contractual problems do not arise, an award can violate an important law or rule. Arbitration is above the law if courts cannot vacate awards that conflict with public policy.

These paradoxical concerns carry over to the arena of individual employment rights with additional dilemmas for reviewing courts. Arbitration of individual employment rights is in a much earlier stage of development than labor arbitration. Thus, the standards for reviewing these arbitration awards have yet to be promulgated in Supreme Court decisions like the *Trilogy*. Without such guidance, federal courts have applied statutory standards under the Federal

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the arbitrator. For a comparison to individual employment arbitration, see Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1481 n.8 (D.C. Cir. 1997) (estimating arbitrators' fees of $250–$350 per hour and fifteen to forty hours of arbitrator time in an employment case, for total arbitrators' fees of $3,750 to $14,000). *See also* Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 552 (4th Cir. 2001) (quoting Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999) ("[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve.").

[10] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *See infra* notes 76–82 and accompanying text.

[11] United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

Arbitration Act (FAA).[12] They have also developed non-statutory standards to review awards, such as manifest disregard of the law.[13]

The dilemmas posed by these appealed employment arbitration awards are more complicated because they often result from a very different bargain. In the labor-management realm, unions seek grievance arbitration and employers are free to take it or leave it, or negotiate over it.[14] In the nonunion setting, employers often impose arbitration upon their employees to avoid expensive liability for discrimination.[15] Thus, agreements to arbitrate individual employment rights are sometimes adhesive.[16] They may also institutionalize bias or other serious problems in the selection of arbitrators.[17] Unlike the federal judiciary, where presidential appointments are made consciously to reflect diversity in American society, the pool of arbitrators available to hear employment discrimination cases is much more homogeneous.[18] Thus, if courts

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[12] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000). *See infra* note 307.

[13] The most common non-statutory standard is manifest disregard of the law. For a more complete discussion, see Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the 'Manifest Disregard' of the Law Standard*, 27 IND. L. REV. 241 (1993).

[14] *E.g.*, Lehigh Portland Cement Co. v. Cement, Lime, Gypsum, and Allied Workers Div., 849 F.2d 820, 826 (3rd Cir. 1988).

[15] *See* GEN. ACCOUNTING OFFICE, *supra* note 1 (stating that private firms use ADR systems because "almost any system is quicker, cheaper, and less harrowing than going to court").

[16] For example, the Supreme Court of California, holding that a mandatory employment arbitration agreement was adhesive and unconscionable, stated,

> It was imposed on employees as a condition of employment and there was no opportunity to negotiate. . . . [T]he economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.).

Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).

[17] *E.g.*, GEN. ACCOUNTING OFFICE, PROCEDURES FOR UPDATING ARBITRATOR DISCLOSURE INFORMATION (2000), WL GAO/HEHS 01-162.

[18] Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 LAW & INEQ. 159, 167 (2001). Empirical research by Tobias showed that "[i]n 1994, President Clinton named twenty-nine women (29%) and thirty-seven (37%) minorities out of 101 judges." The push to increase diversity on the federal bench is so powerful that President George W. Bush gave this significant consideration in announcing his first group of federal judges. Among these eleven appointees, he nominated two African-Americans, one Hispanic, and one woman. *See also* John Harwood & Robert Greenberger, *Bush's Judicial Picks Signal the Beginning of Battle for Courts*, WALL ST. J., May 10, 2001, at A1. *Cf.* EMPLOYMENT DISCRIMINATION—HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES (1994), WL GAO/HEHS 94-17 [hereinafter REGISTERED REPRESENTATIVES] (showing that in

rubber-stamp every award challenged under this system, the worst tendencies of this dispute resolution process never can be curbed.

B. *Organization of This Article*

This Article may be the first to provide empirical measures of judicial review of workplace arbitration awards in the labor-management and individual rights domains. Thus, it provides new evidence about the autonomy of these vital dispute resolution processes. This study also shows how courts hold workplace arbitration accountable to public laws.

Section II examines the Supreme Court's promotion of workplace arbitration in the separate arenas of union-management relations and individual employment rights.[19] When the Eightieth Congress enacted sweeping reforms to curb union powers in 1947, they sought a legal process to secure labor's compliance with contractual promises not to strike employers. Their solution was section 301 of the Taft-Hartley Act, a provision that vested federal courts with jurisdiction to enforce labor agreements.[20] Section II.A. analyzes this statutory source for enforcing labor arbitration awards.[21]

Congress failed to make clear, however, whether federal courts were to apply state contract law to disputes arising under labor agreements, or develop their own common law consistent with federal labor law. Section II.B. examines how the Supreme Court adopted the latter view in its seminal *Lincoln Mills* decision.[22] This section also explores the *Trilogy* decisions decided by the Court three years later. There, the Court set forth standards that made arbitration awards final and binding except in unusual circumstances.[23]

Our research in section II.C. examines a more recent development in the emergence of judicial review standards. The Court's decisions in *W.R. Grace & Co. v. Rubber Workers* and *United Paperworkers International Union v. Misco*,[24] grew out of awards that conflicted in some sense with a public policy. We explain how the Court set forth very narrow grounds, consistent with

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1992, the typical NYSE arbitrator was a white male, sixty years of age; only eleven percent were women, and less than one percent were African American).

[19] *See infra* notes 58–143.

[20] *See infra* notes 68–69.

[21] *See infra* notes 58–71.

[22] *See infra* notes 72–83.

[23] *See infra* notes 83–94.

[24] *See infra* notes 97 and 100, respectively.

principles from the *Trilogy*, for vacating arbitrator rulings on public policy grounds.[25]

Section II.D. describes how the Supreme Court renewed its protective jurisdiction over this dispute resolution process during the 2000–2001 term.[26] *Eastern Associated Coal Corp. v. United Mine Workers* provides additional guidance for courts in which award-appeals are based on a specific government regulation.[27] *Major League Baseball Players Ass'n v. Garvey* is the first Supreme Court decision that exclusively deals with vacatur of awards when a judge disagrees with an arbitrator's findings of fact.[28]

Part II.E. examines the much newer area of judicial review of individual employment arbitration.[29] Unlike labor arbitration, this story begins in 1925 when Congress enacted the Federal Arbitration Act (FAA) in response to judicial hostility to commercial arbitration. The FAA granted federal courts jurisdiction to enforce arbitration clauses in contracts, and stated very limited grounds for vacating awards. The law excluded contracts of seamen and rail workers, but the significance of this provision for employment arbitration did not surface until recently. In the landmark decision, *Gilmer v. Interstate/Johnson Lane Corp.*,[30] the Supreme Court ruled that a securities broker's agreement with his employer—which mandated arbitration of all disputes between the parties—precluded him from suing under the Age Discrimination in Employment Act on an age discrimination claim. In response to a conflict among circuit courts, the Supreme Court very recently extended *Gilmer* to cover almost all individual employment contracts.[31]

Section III explores the research literature on judicial review of arbitration and explains our attempt to improve on the methodology that typifies these studies.[32] Section III. also raises questions about the methods and conclusions of research.[33] In addition, Section III. sets forth the research methodology for this quantitative study.[34] Adapting the methodology from our 1991 analysis of 1118 district court and 480 appellate court decisions, which ruled on challenged

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[25] *See infra* notes 95–112.

[26] *See infra* notes 113–21.

[27] *See infra* note 114.

[28] *See infra* notes 118–21.

[29] *See infra* notes 122–43.

[30] *See infra* notes 120–29.

[31] *See* Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001).

[32] *See infra* notes 144–56.

[33] *See infra* notes 144–49.

[34] *See infra* notes 150–56.

arbitration awards,[35] we explain how we used online research methods to survey federal decisions from late June 1991 to late March 2001.[36] We also discuss how we applied this methodology to *Gilmer*-type arbitration appeals.

The results from this empirical investigation are presented in Section IV.[37] The first section provides two tables of data that summarize our findings for labor arbitration appeals. Table 1 compares court confirmation rates of awards in 1960–1991 and 1991–2001.[38] Table 2 shows how courts rule when presented with a variety of *Trilogy* or *Misco* issues.[39] Section IV.B. features Table 3, where we present results for arbitration of individual employment rights.[40]

Section V probes beyond our statistical findings by identifying decisions that epitomize current trends.[41] We begin in section V.A. by deducing a range of acceptable award confirmation rates.[42] This is an important advance in the research literature, because commentators have not stated or hinted at an appropriate performance standard for federal courts that review awards.[43] We extend our inquiry to other empirical studies of judicial behavior in reversing adjudicatory bodies that have original jurisdiction of disputes. Although they are rare, these studies have examined trends in federal court review of orders by the National Labor Relations Board (NLRB or Board)[44] and verdicts by patent

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[35] *See infra* note 154; pp. 54–56 tbl.3.

[36] *See infra* notes 154–55.

[37] *See infra* notes 157–64 and accompanying text, and Tables 1–3.

[38] *See infra* p. 50 tbl.1.

[39] *See infra* p. 52 tbl.2. We find that (1) courts are consistent in confirming challenged awards, (2) courts in the South confirm a much lower percentage of awards, (3) most challenged awards favor unions, and (4) confirmation rates vary only moderately by the type of issue used to challenge awards.

[40] *See infra* pp. 54–56 tbl.3. The main findings show that challenges to individual employment arbitration awards are a recent development, mostly occurring since 1999; most involve the securities industry; over half the cases raise discrimination claims, and almost half have either female or African-American complainants; most arbitrations involve terminations; employees receive monetary compensation in about one-third of all awards, and are more likely than employers to sue to vacate an award; employers win about two-thirds of these award-challenge cases; and courts confirm a very high percentage of individual employment awards but fewer awards in the most recent period.

[41] *See infra* notes 165–375.

[42] *See infra* notes 165–92.

[43] *See infra* notes 147–148.

[44] *See infra* notes 173–179.

courts.[45] We also discuss a similar study of state appellate court reversals of death penalty sentences.[46]

Section V.B. is organized around a matrix in Chart 1.[47] This posits three sources that cause abnormally low or high confirmation rates in the labor and employment rights arenas (yielding six cells in our matrix).[48] This, too, is an advance over previous research, because commentators consider judges the only culprits in driving down award confirmations. Our discussion for Cell 1 highlights cases in which judges appeared to ignore the *Trilogy* by re-arbitrating the underlying disputes.[49] Cell 2 presents cases of foolish judgment or behavior by labor arbitrators.[50] Cell 3 examines several cases in which arbitrators reinstated terminated drug or alcohol offenders, and courts vacated their awards.[51] These cases show a conflict between arbitral and judicial values.

Cells 4 through 6 involve arbitrations of individual employment rights. In Cell 4, we examine a case in which a judge appeared to be at fault for ignoring clear signs of an unfair arbitration.[52] Cell 5 explores cases where arbitrators may have been at fault. In these decisions, courts vacated awards that were in manifest disregard of the law.[53] Cell 6 focuses on cases where the arbitrator's error may have been a by-product of a serious flaw in the dispute resolution process.[54]

Our conclusions appear in Section VI.[55] Tying together our empirical findings in Section IV and our theoretical model of an appropriate range of award confirmation rates in Section V, we conclude that in the labor-management arena most courts, except those in the South, have performed appropriately.[56] In the domain of individual employment arbitrations, courts have also behaved appropriately, although here we observe that judicial performance is hampered by the lack of clear reviewing standards similar to those

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[45] *See infra* notes 181–84.

[46] *See infra* notes 185–89.

[47] *See infra* notes 104–375.

[48] These include (1) judges, (2) arbitrators, and (3) the arbitration system.

[49] *See infra* notes 194–206.

[50] *See infra* notes 207–58.

[51] *See infra* notes 259–92.

[52] *See infra* notes 293–311.

[53] *See infra* notes 312–54.

[54] *See infra* notes 355–75.

[55] *See infra* notes 376–415.

[56] *See infra* notes 378–98.

promulgated by the Supreme Court in the *Trilogy*, *W.R. Grace*, and *Misco* in the union-management context.[57]

II. THE SUPREME COURT PROMOTES WORKPLACE ARBITRATION

A. *The Origins of Judicial Review Standards for Labor Arbitration Awards*

In this Section, we trace the development of judicial standards for court review of labor arbitration.[58] We also highlight the unusually large number of workplace arbitration decisions handed down by the U.S. Supreme Court during its 2000–2001 term.[59] By devoting a disproportionate share of its annual caseload to workplace arbitration in this term, the justices revealed their abiding interest in this subject.[60]

The widespread diffusion of labor arbitration in the years leading up to the *Trilogy* accounts for the Supreme Court's view that judges should respect the autonomy of this dispute resolution system. Following a wave of national strikes in 1946, a Republican Congress enacted the Labor-Management Relations Act of 1947 (also called the LMRA or the Taft-Hartley Act).[61] This legislation consisted of a series of amendments to the National Labor Relations Act (NLRA) to curb union power.

Section 301 of the LMRA was a major part of this collective bargaining reform. On its face, it provided an innocuous grant of jurisdiction to federal courts for the purpose of enforcing collective bargaining agreements. To unions, however, federal jurisdiction of labor disputes revived a long and bitter history. Federal courts were widely acknowledged to be biased against unions in labor

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[57] *See infra* notes 399–412.

[58] For a highly regarded analysis of the early phases of this evolution, see Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

[59] Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724 (2001).

[60] To put the three workplace arbitration cases during the 2000–2001 term in perspective, see Robert S. Greenberger & Jackie Calmes, *Next President Likely to Tip Balance of Supreme Court*, WALL ST. J., Oct. 2, 2000, at A36 (reporting that the Court decided only seventy-three cases in its 1999–2000 term).

[61] *See* 1 ABA SECTION OF LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW 36 (Patrick Hardin ed., 3d ed. 1992).

disputes during the early twentieth century.[62] As a consequence, Congress divested federal courts of jurisdiction to enjoin these disputes when the Norris-LaGuardia Act was passed in 1932.[63]

As Republicans took control of the Eightieth Congress, they sought to make unions "responsible partners in collective bargaining."[64] The NLRA provided no mechanism to enforce labor agreements in federal courts. As a result, when unions who had agreed to a no-strike clause in a contract violated this promise, employers were unable to get a court order of enforcement.[65] In sum, Republicans aimed to secure union compliance with contractual promises.[66]

This explains why unions perceived sections 301(a) and (b) as a double threat. Because unions were voluntary associations and not corporations, they could not be sued in state courts.[67] Section 301(a) remedied this jurisdictional void by providing that

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[68]

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[62] This is well-documented in the seminal treatise, FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

[63] Norris LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (1999)). The bill's author, Rep. Fiorello LaGuardia, explained, "Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges." 75 Cong. Rec. H5478 (March 8, 1932) (statement of Rep. LaGuardia).

[64] James E. Pfander, *Judicial Purpose and the Scholarly Process: The* Lincoln Mills *Case*, 69 WASH. U. L.Q. 243, 256 (1991).

[65] S. REP. NO. 80-105 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 421 (1959).

[66] *See* H. R. REP. NO. 80-245 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 337 (1959), stating,

> When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens. Labor organizations cannot justifiably ask to be treated as responsible contracting parties unless they are willing to assume the responsibilities of such contracts to the same extent as the other party must assume his.

[67] *Id.*

[68] Act of June 23, 1947, ch. 120, tit. III, § 301, 61 Stat. 156 (codified at 29 U.S.C. § 185(b)).

Section 301(b) provided that unions could be sued for damages.[69]

As the Supreme Court later noted in the *Trilogy*, the institution of labor arbitration was fundamental to imposing this regulatory scheme:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement... The grievance procedure is, in other words, a part of the continuous collective bargaining process.[70]

In sum, section 301 made arbitration in collective bargaining agreements "the terminal point of a disagreement."[71]

B. *Early Development of Federal Common Law To Enforce Labor Agreements:* Lincoln Mills *and the* Trilogy

During the period when the LMRA became law, most employers and unions agreed to arbitrate disputes that arose under their contracts.[72] As one commentator from the period observed, "[t]he substitution of arbitration for

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[69] The Act of June 23, 1947, ch. 120, tit. III, § 301, 61 Stat. 156–157 (codified at 29 U.S.C. § 185(b)), stated,

> Any labor organization which represents employees in an industry affecting commerce... shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

[70] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

[71] *Id.* at 581.

[72] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, ARBITRATION PROVISIONS IN UNION AGREEMENTS 2, 4 tbl.1 col.2 (1944) (seventy-three percent of 1254 firms covered by a labor agreement had an arbitration provision in their contract); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR-MANAGEMENT CONTRACT PROVISIONS 1 (1951) (eighty-three percent of 1482 firms covered by a labor agreement had an arbitration provision in their contract); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR-MANAGEMENT CONTRACT PROVISIONS 10 (1953) (eighty-nine percent of 1442 firms covered by a labor agreement had an arbitration provision in their contract).

economic weapons in disputes under contract . . . is a salutary development."[73] Numerous problems arose.[74] Management resistance to the authority of arbitrators[75] aggravated these difficulties.

Matters came to a head in *Textile Workers Union v. Lincoln Mills*.[76] This simple dispute involved a union grievance over work loads, which the employer refused to submit to arbitration.[77] In an ironic twist—employers, after all, were expected to utilize federal courts to protect their rights in labor agreements—a union sued under section 301 to enforce its arbitration clause.[78] The case raised the basic issue of whether Congress intended federal courts to be simply a neutral venue for applying state contract law to labor agreements, or whether federal courts were supposed to develop their own common law for these contracts.[79] In

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[73] LUDWIG TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING 350 (1947).

[74] A comprehensive overview appears in Harold W. Davey, *Hazards in Labor Arbitration*, 1 INDUS. & LAB. REL. REV. 386 (1948) (problems included confusion between arbitration and mediation, scope of the arbitration clause, definition of grievance procedures, misuses such as excessive resort to arbitration and use of arbitration as a face-saving device).

[75] See the veiled contempt for arbitrators expressed by a notable management attorney in Tracy H. Ferguson, *An Appraisal of Arbitration: A Management Viewpoint*, 8 INDUS. & LAB. REL. REV. 79 (1954):

> There is no doubt that political events since 1935 have played a part in shaping the thinking of those who have served as arbitrators. Admittedly, the Wagner Act was an invasion of 'management's prerogatives' as was other legislation that followed. Decisions of administrative agencies thereunder have 'whittled away' management's prerogatives. With such a tendency apparent in law books and the actions of government agencies, it is understandable that those who are experts in the field, trained primarily through experience in the last decade, would see the problems presented for arbitration in what has been called the 'enlightened' view, but which many employers feel is inimical, not only to their self-interests, but to the welfare of their employees, and more broadly, to the general economy.

Id. at 81.

[76] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[77] *Id.* at 449.

[78] *Id.*

[79] *Id.* at 456 ("The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."). This issue was once the subject of epic debates. A sample of this exhaustive literature includes Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Donald H. Wollett & Harry H. Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955). The enforceability of labor agreements in the period before passage of section 301 is treated in William Gorham Rice, Jr., *Collective Labor Agreements in American Law*, 44

Lincoln Mills, the Supreme Court adopted the latter. In ruling to compel the employer to submit to arbitration,[80] the Court majority treated collective bargaining agreements as extensions of federal law.[81] They believed that Congress wanted federal courts to develop a unique set of rules for the enforcement of these contracts.[82]

The federal common law of labor arbitration took form three years later in the *Trilogy*. Announced by the Supreme Court on June 23, 1960, these rulings involved three grievance arbitration appeals brought by the same union. In *United Steelworkers of America v. American Manufacturing Co.*, involving an employer's refusal to arbitrate a grievance, the Supreme Court reversed district and circuit court refusals to order arbitration.[83] In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, employees were laid-off after part of their work was subcontracted. Here, again, the Court reversed lower federal courts and ordered arbitration of the grievances. *United Steelworkers of America v. Enterprise Wheel & Car Corp.* differed from *Warrior & Gulf* and *American Manufacturing*, because the employer agreed to submit the union's grievance to arbitration. After the arbitrator's award reduced the termination of several employees to a ten day suspension, the employer refused to comply with the award. The Supreme Court reversed the Fourth Circuit's order that denied enforcement to the arbitrator's award.

As is suggested by its mystical moniker, the *Trilogy* stated transcendent principles for federal courts that are called upon, pursuant to section 301, to

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HARV. L. REV. 572 (1931); T. Richard Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938).

[80] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 459 (1957).

[81] *Id.* at 457 ("It is not uncommon for federal courts to fashion federal law where federal rights are concerned. Congress has indicated by § 301(a) the purpose to follow that course here.").

[82] Justice Douglas provided little practical guidance on this key point when he said,

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Id.

[83] United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 568 (1960). The appellate court called the grievance "a frivolous, patently baseless one," United Steelworkers v. Am. Mfg. Co., 264 F.2d 624, 628 (1959), but the Supreme Court reversed and ordered arbitration, stating that "[w]hether the moving party is right or wrong is a question of contract interpretation for the arbitrator .... The courts, therefore, have no business weighing the merits of the grievance ...." *Am. Mfg.*, 363 U.S. at 568.

enforce arbitration provisions in labor agreements. Here, we highlight two principles that bear directly on our empirical research.[84] These form the primary grounds for confirming or vacating an arbitrator's award.

1. *The Award Fails To Draw Its Essence from the Collective Bargaining Agreement*

In *Enterprise Wheel*, the Court stated that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement."[85] When the arbitrator dispenses "his own brand of industrial justice" contrary to the agreement, the "courts have no choice but to refuse enforcement of the award."[86]

2. *The Arbitrator Exceeds His Authority*

The *Enterprise Wheel* Court also stated that a "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award."[87] An award should not be disturbed unless the arbitrator "has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration."[88] A court should not vacate an award merely because it disagrees with the arbitrator's construction of the agreement.[89]

The *Trilogy* did more than state principles for evaluating claims to confirm or vacate awards. In nearly worshipful tones, Justice Douglas paid tribute to the special abilities of arbitrators. We also highlight these, because they embody the special kind of judicial deference that the Supreme Court wanted to accord to arbitration awards.

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[84] *See infra* p. 52 tbl.2.

[85] United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[86] *Id.*

[87] *Id.* at 598.

[88] *Id.*

[89] *Id.*

3. *The Arbitrator Is Entrusted by the Parties To Resolve Their Dispute*

The *American Manufacturing* Court noted that the "function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator," because it is "the arbitrator's judgment . . . that was bargained for."[90] *Warrior & Gulf* also noted that the arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept . . . . He is rather part of a system of self-government created by and confined to the parties."[91] In this vein, "[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."[92]

4. *The Arbitrator Has Special Insight into Workplace Disputes*

The *Warrior & Gulf* Court lavished praise on arbitrators:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts[93]. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[94]

5. *The Arbitrator Needs Latitude and Flexibility*

Even though an arbitrator is not permitted to dispense his own brand of industrial justice, the *Enterprise Wheel* Court directed judges to give arbitrators wide latitude in ruling on grievances:

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[90] United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 567–68 (1960).

[91] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

[92] *Id.* at 582.

[93] *Id.* at 581.

[94] *Id.* at 582.

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.[95]

C. *Recent Development of Federal Common Law To Enforce Labor Agreements: The Public Policy Exception in* W.R. Grace *and* Misco

After the *Trilogy*, federal courts gradually expanded judicial review to include the public policy exception. On the one hand, this was nothing but an extension of the common law doctrine that courts do not enforce terms of an illegal contract.[96] By this time, however, a series of employment discrimination laws complicated labor arbitration.[97] To illustrate, an employer in need of laying off part of its workforce might have to choose between adhering to a collective bargaining agreement and thereby retain white men while laying off minorities and women or comply with a consent decree resulting from a race and sex discrimination lawsuit.

This was the choice that confronted the employer in *W.R. Grace & Co. v. International Union of United of Rubber Workers, Local 759*.[98] In upholding the arbitrator's award, the Court sent a seemingly clear message: only in rare circumstances where "the contract as interpreted by [the arbitrator] violates some

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[95] United Steelworkers v Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[96] *See* Muschany v. United States, 324 U.S. 49, 66 (1945).

[97] The classic statement of this problem appears in David E. Feller, *The Coming End of Arbitration's Golden Age, in* ARBITRATION—1976, 29 PROC. NAT'L ACAD. ARB. 97, 109 (1976) ("Arbitration is not an independent force, but a dependent variable, and to the extent that collective bargaining is diminished as a source of employee rights, arbitration is equally diminished.").

[98] W.R. Grace & Co. v. Int'l Union of United Rubber Workers, Local 759, 461 U.S. 757 (1983). The employer had entered into a consent decree with the Equal Employment Opportunity Commission that required the company to maintain its extant proportion of women and blacks in the work force in the event of layoffs to remedy past sex and race discrimination at its Corinth, Mississippi plant. A year after entering into the decree, the employer needed to lay off part of its work force and, consistent with the decree, protected females and blacks by laying off white males. Having more seniority than the protected employees, the white males filed a grievance to vindicate this contractual right. After being compelled by federal courts to arbitrate the grievance, the company lost at arbitration. The arbitrator ruled that the employer had breached the collective bargaining agreement, notwithstanding the consent decree, and awarded the affected employees damages rather than reinstatement. *Id.* at 762–64.

explicit public policy" are courts "obliged to refrain from enforcing it."[99] However, "[s]uch a public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[100]

Just four years later, the Court revisited this matter in *United Paperworkers International Union v. Misco, Inc.*[101] An arbitrator reinstated a paper mill worker who was fired after he was arrested in the company parking lot on a drug charge.[102] Lower courts vacated the award—and thus, the Company did not reinstate the grievant—because they believed that it would violate a public policy against operating dangerous machinery by drug-users.[103] *Misco* reversed these rulings, holding that awards may be set aside only if they "would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained 'by reference to laws and legal precedents and not from general considerations of supposed public interests.'"[104]

Misco did more than reaffirm the *Trilogy*. The decision dealt explicitly with two other grounds that lower courts used to review awards. We highlight these because they also bear on our empirical methodology.[105]

1. *The Arbitrator Is Biased or the Award Is Procured by Fraud*

While the *Trilogy* did not contemplate the possibility of bias or fraud, *Misco* did in these terms: "[D]ecisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced."[106] The *Misco* Court believed that this was a very unlikely basis for vacating an award, noting "there is nothing of that sort involved in this case."[107] In addition, the Court heavily insulated awards by instructing judges not to vacate awards with serious errors: "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[108]

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[99] *Id.* at 766.

[100] *Id.* (quoting *Muschany*, 324 U.S. at 66).

[101] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).

[102] *Id.* at 34.

[103] *Id.* at 34–35.

[104] *Id.* at 43 (quoting *Muschany*, 324 U.S. at 66).

[105] *See infra* p. 52 tbl.2.

[106] *Misco*, 484 U.S. at 38.

[107] *Id.*

[108] *Id.*

2. *The Arbitrator's Fact-Finding or Procedural Conduct Is Aberrational*

Misco stated a nearly absolute rule against reviewing an arbitrator's fact-findings: when "only improvident, [or] even silly, factfinding is claimed . . . [t]his is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts."[109] The Court implied in the same passage, however, that a court might disturb arbitral fact-findings that were "dishonest."[110] The Court never explained the difference between silly and dishonest fact-finding, but in the same discussion, it suggested that the latter could result from the arbitrator's procedural misconduct:

> Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.[111]

Still, *Misco* emphasized that "courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact . . . ."[112] And it noted further, "Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."[113]

D. *Current Developments in the Federal Common Law to Enforce Labor Agreements:* Eastern *and* Garvey

Today the standards for judicial review of labor arbitration awards are almost entirely settled—certainly, there are no new *Trilogy* issues for the Court to decide. The main remaining contention is the public policy exception to award confirmation. This arose from the *Misco* Court's refusal to address the argument

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[109] *Id.* at 39.

[110] *Id.*

[111] *Id.* at 40 n.10.

[112] *Id.* at 36.

[113] *Id.* at 38.

that "a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law."[114] The Court recently reconsidered the public policy exception to award confirmation in *Eastern Associated Coal Corp. v. United Mine Workers, District 17.*[115] In addition, because some courts blur the line between "the arbitrator dispens[ing] his own brand of industrial justice" and the arbitrator's "aberrational" fact-finding or procedural conduct,"[116] *Garvey* clarified this matter.

In *Eastern*,[117] a coal company fired an employee on two occasions after finding that he used marijuana while driving heavy machinery on a public highway. Separate arbitration awards reinstated him, but with restrictions. The company refused to comply with the second award, contending that it violated a U.S. Department of Transportation rule stating that "the greatest efforts must be expended to eliminate the . . . use of illegal drugs . . . by those individuals who are involved in [certain safety-sensitive positions, including] the operation of . . . trucks."[118] The Supreme Court rejected this argument because DOT rules also favor rehabilitation of drug users, and no rule expressly prohibits a drug offender from being employed as a truck driver.

In the same vein, the Court renewed its admonition to all federal courts to refrain from second-guessing fact findings made by arbitrators. In *Major League Baseball Players' Ass'n v. Garvey*, the Ninth Circuit rejected an arbitrator's factual findings and then resolved the merits of the parties' dispute instead of

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[114] *Id.* at 45 n.12.

[115] E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57 (2000).

[116] A perfect illustration appears in *Garvey v. Roberts*, 203 F.3d 580 (9th Cir. 2000):

> In the present case, accepting Arbitrator Roberts' reasons as the basis for the award leads us inexorably to the conclusion that in reaching his decision the arbitrator 'dispensed his own brand of industrial justice.' The arbitrator denied Garvey's claim for the reason that Ballard Smith's 'testimony' regarding Garvey's contract negotiations at the 1996 individual claim proceeding was 'in stark contradiction' to the statements Smith made in his capacity as the San Diego Padres' President and Chief Executive Officer at the infamous 1986 collusion hearing. Based on this contradiction, the arbitrator credited the version of events described by Smith at the earlier collusion hearing and, accordingly, concluded that both Smith's and Garvey's testimony at the later proceeding was false. To understand why this decision can only be explained as an attempt by the arbitrator to dispense his own brand of industrial justice, we must review the context in which he reached his extraordinary conclusion.

Id. at 589.

[117] *Eastern*, 531 U.S. 57 (2000).

[118] *Id.* at 63 (quoting Department of Transportation Act, Pub. L. No. 102–143, § 2(3), 105 Stat. 917, 953 (1991)).

remanding the case for further arbitration proceedings.[119] An annoyed Supreme Court upbraided the appeals court, stating, "We recently reiterated that if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that a 'court is convinced he committed serious error does not suffice to overturn his decision.'"[120] In a revealing passage, where the justices deemed the appellate court's ruling "nothing short of baffling,"[121] the Court pointedly repeated itself, declaring, "But again, established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."[122]

E. *Individual Employment Arbitration: The Newest Form of Workplace Dispute Resolution*

Turning to the nonunion form of workplace arbitration, the Supreme Court has only regulated employer imposition of a requirement to arbitrate employment disputes. This is called mandatory or compulsory arbitration, because employees are required as a condition of employment to agree to arbitrate an employment dispute and waive their right to sue in court. Ten years ago, in *Gilmer v. Interstate/Johnson Lane Corp.*,[123] the Court ruled that the Federal Arbitration

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[119] Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724 (2001) (per curiam). The underlying dispute involved a grievance by former star first baseman, Steve Garvey, alleging that Ballard Smith, CEO of the San Diego Padres, colluded with other baseball executives to deny him a new contract or a contract extension. Garvey presented a June 1996 letter from Smith stating that, before the end of the 1985 season, Smith offered to extend Garvey's contract through the 1989 season, but that the Padres refused to negotiate with Garvey thereafter due to collusion. The arbitrator did not find this letter credible, however, because of its "stark contradictions" with Smith's testimony at an earlier hearing. This factual determination led the arbitrator to deny Garvey's grievance for $3,000,000. *Id.* at 1726–27.

[120] *Id.* at 1728 (quoting *Eastern*, 531 U.S. at 62).

[121] *Id.* In a further rebuke, the Court observed that "the Court of Appeals here recited these principles, but . . . it overturned the arbitrator's decision because it disagreed with the arbitrator's factual findings, particularly those with respect to credibility." The Ninth Circuit said it would have credited Smith's 1996 letter, and it concluded that the arbitrator's contrary conclusion was "irrational" and "bizarre." *Id.* (citing Garvey v. Roberts, 203 F.3d 580, 590–91 (9th Cir. 2000).

[122] *Id.* at 1729. Repeating its guidance in *Misco*, the Court stated again, "When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding,' does not provide a basis for a reviewing court to refuse to enforce the award." *Id.* at 1728.

[123] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

Act applied to the agreement of a securities broker. This meant that Robert Gilmer, who sued his former employer in federal district court on an age discrimination claim, was compelled to arbitrate his claim.[124]

Notably, the Supreme Court limited its holding in *Gilmer*. Several amici curiae in support of Gilmer wanted a broader ruling from the Court that most arbitration clauses in employment agreements are not covered by the FAA. They contended that the FAA's exclusion section, enacted in 1925 and consisting of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"[125] was meant to exclude all employment contracts. According to them, this was Congress' way of saying in 1925 that the FAA is a commercial and not an employment law. The majority refused to rule directly on this point.[126] Because the Court avoided this issue, lower courts became immersed in it.[127]

But the majority decided enough of this issue to give many employers the impression that arbitration clauses in their employment contracts are enforceable. This was accomplished when the majority wrote that "we choose to follow the plain language of the FAA and . . . therefore hold that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement."[128] Added to this, the Court emphatically rejected Gilmer's argument that an arbitration agreement could not result in a waiver of an individual's access to a judicial forum.[129] Since Gilmer did not prove that Congress intended to prevent arbitration of age discrimination claims, the majority reasoned that an employer and employee could agree to private adjudication of these claims.[130]

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[124] *Id.* at 23–24.

[125] *Id.* at 25 n.2 (quoting 9 U.S.C. § 1 (2000)).

[126] *Id.* The Court stated,

> Gilmer, however, did not raise the issue in the courts below; it was not addressed there; and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment.

Id.

[127] The majority forced this question on lower courts when it said that "we leave for another day the issue raised by amici curiae." *Id.*

[128] *Id.*

[129] The majority based this conclusion on the fact that the Court had ruled in earlier cases involving arbitration agreements that legal claims arising under a wide variety of federal statutes were to be arbitrated rather than litigated in court. *Id.* at 26.

[130] The majority said, "we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." *Id.* The Court ultimately concluded that Gilmer failed to prove that Congress intended to prohibit the arbitration of these claims. *Id.* at 35.

While *Gilmer* only dealt with the arbitrability of an ADEA claim, the majority opinion gave some hint about the standard that courts should apply in reviewing this kind of arbitration award. Gilmer contended that "judicial review of arbitration decisions is too limited."[131] The majority rejected his argument by noting that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue."[132]

Following *Gilmer*, many employers adopted employment arbitration programs.[133] In addition, most federal circuits extended *Gilmer* to arbitration agreements involving other occupations and to other federal anti-discrimination statutes.[134] The Ninth Circuit defied this trend in *Craft v. Campbell Soup Co.*[135] To resolve this serious split among appellate courts, the Supreme Court granted certiorari in *Circuit City Stores, Inc. v. Adams.*[136]

In that decision, a sales clerk who had signed an employment arbitration agreement on his employment application sued the company in a California state court and alleged a variety of discrimination violations. Circuit City petitioned to remove the matter to federal court, under jurisdiction provided by the FAA, to enforce the arbitration agreement. The federal district court granted the Company's motion, and Adams appealed. While his appeal was pending, the Ninth Circuit issued *Craft*. The expansive holding of *Craft*[137] divested federal courts in the circuit of jurisdiction to enforce employment arbitration contracts.

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[131] *Id.* at 32 n.4 (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

[132] *Id.* (quoting *Shearson/Am. Express, Inc.*, 482 U.S. at 232).

[133] *See* Bickner et al., *supra* note 2.

[134] *See* McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998); O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273–74 (4th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 357 (7th Cir. 1997); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 747–48 (5th Cir. 1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 597–601 (6th Cir. 1995).

[135] Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999) (per curiam).

[136] Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001).

[137] *Craft*, 177 F.3d 1094 (stating that "we hold that the FAA does not apply to labor or employment contracts. . . . [W]e have no jurisdiction over Campbell Soup's interlocutory appeal and this appeal is hereby dismissed."). *Craft* differed from decisions of other circuits by examining the legislative history of the FAA. *Id.* at 1089–91. According to the *Craft* court, when Congress enacted the FAA in 1925, it intended that the law apply only to commercial transactions. *Id.* at 1090. In addition, when Congress exempted seamen and rail employees, this was its full extension of commerce powers over the employment relationship. Thus, when the *Craft* court interpreted the exclusion section of the FAA in light of the near vacuum of federal regulation of private-sector employment in 1925, it reasoned

In deciding to review *Circuit City Stores, Inc. v. Adams*, the Supreme Court addressed the question reserved by the *Gilmer* majority—does the FAA's exclusion of employment contracts in section 1 of "seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce" mean that all other employee contracts are covered by the FAA?

The *Circuit City Stores, Inc.* majority took a simple approach in ruling that the FAA's exclusionary language is limited to the occupations expressly enumerated in section 1. Five justices reasoned that if this exclusion was so broad as to cover all employment contracts, there would be no point in its specific reference to seamen and railroad employees.[138] The majority also applied the canon of ejusdem generis to interpret the breadth of section 1's reference to "any other class of workers engaged in [interstate] commerce."[139] The first part of this analysis construed the term "any other class of workers" to mean that "this . . . residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it . . . ."[140] In treating the remaining ambiguity in section 1B—"engaged in . . . [interstate] commerce" — the majority responded indirectly to the Ninth Circuit's theory of variable federal jurisdiction over private-sector employment contracts.[141] In dissent, Justice Stevens reasoned that the majority improperly

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that the statute's exclusion of employment contracts expanded as federal employment regulation grew exponentially in the 1930s and later. *Id.* at 1086–87.

[138] *See Circuit City Stores, Inc.*, 121 S. Ct. at 1308, stating, "This line of reasoning proves too much, for it would make the § 1 exclusion provision superfluous." The Court continued, "If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce, would be pointless.'" *Id.*

[139] *Id.* "The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* at 1308–09 (quoting 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (4th ed. 1991)).

[140] *Id.* at 1309.

[141] *Id.* at 1308. The majority declined to offer their own legislative history of the FAA. Instead, they over-interpreted the difference between statutes that say "affecting commerce," "involving commerce," and "engaged in commerce." *Id.* at 1309. Thus, they drew a negative inference from the FAA's use of the words "engaged in commerce:"

ignored congressional consideration of the unequal bargaining power between employers and employees when the FAA was enacted.[142]

Summarizing key developments in the Supreme Court's treatment of workplace arbitration since the *Trilogy*, the labor arbitration model is at a mature stage where little future development should be expected. Courts may vacate arbitrator rulings, but only in very limited circumstances. In contrast, the individual employment model is more than forty years behind labor jurisprudence. *Circuit City Stores, Inc.* merely decided the threshold issue of judicial enforcement of agreements to arbitrate employment disputes.[143] Moreover, the Court intends to add its regulatory imprint in this area by deciding whether an arbitration agreement precludes enforcement of employment discrimination law by administrative agencies.[144] Although this form of arbitration is more controversial than the labor model, the *Gilmer* and *Circuit City Stores, Inc.* decisions mean, in a practical sense, that the growing use of this dispute resolution method will not be stopped by federal courts. In our view, it is therefore time to accept this reality and devote more attention to the mostly uncharted territory of court review of awards that result from this process.

> Unlike those phrases, however, the general words 'in commerce' and the specific phrase 'engaged in commerce' are understood to have a more limited reach. In *Allied-Bruce* itself the Court said the words 'in commerce' are 'often-found words of art' that we have not read as expressing congressional intent to regulate to the outer limits of authority under the Commerce Clause.

Id. (citation omitted).

[142] *Id.* at 1318. He reasoned that if the majority had been more honest about confronting this history, they could not have avoided observing that "the potential disparity in bargaining power between individual employees and large employers was the source of organized labor's opposition to the Act, which it feared would require courts to enforce unfair employment contracts." *Id.* As for the majority's philosophical preference for strict construction, Justice Stevens drew from the insight of a foreign jurist:

> This case illustrates the wisdom of an observation made by Justice Aharon Barak of the Supreme Court of Israel. He has perceptively noted that the 'minimalist' judge 'who holds that the purpose of the statute may be learned only from its language' has more discretion than the judge 'who will seek guidance from every reliable source.' A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.

Id. (citation omitted).

[143] In that sense, it is most analogous to *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), which validated federal jurisdiction over pre-arbitration disputes. *See supra* notes 76–82.

[144] EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001) (mem.).

III. RESEARCH LITERATURE AND METHODS

The autonomy of the labor arbitration system has been investigated since the *Trilogy*.[145] After more than a decade of experience with the *Trilogy*'s progeny, the National Academy of Arbitrators concluded that courts achieved a proper balance in ordering enforcement of labor arbitration agreements[146] and confirming arbitration awards.[147] As time passed, however, more courts vacated labor arbitrator rulings. This prompted increasing concern during the 1980s that courts interfered too much.[148] Today, this research literature offers a bleak

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[145] *See* Frances T. Freeman Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960); Russell A. Smith & Dallas L. Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831 (1966).

[146] In the 1970s and early 1980s, the Academy concluded that courts practiced deference in accordance with the *Trilogy*. James P. Kurtz, *Arbitration and Federal Rights Under Collective Bargaining Agreements in 1976*, *in* ARBITRATION—1977, at 265 app. b, 288 (Barbara D. Dennis & Gerald G. Somers eds., 1978) ("In general, if the arbitration award is not [in] manifest disregard of the contract and draws its essence from the contract, it will be enforced by the courts in routine fashion."). The Committee applauded courts for being "very sensitive about not usurping the role of the arbitrator in reaching a final and binding decision of a contract dispute." *Id.* at 309.

[147] *See* Edgar A. Jones, Jr., *A Meditation on Labor Arbitration and 'His Own Brand of Industrial Justice'*, *in* ARBITRATION 1982: CONDUCT OF THE HEARING 1, 6 (James L. Stern & Barbara D. Dennis eds., 1983) (concluding that the "courts of appeals have . . . interpret[ed] the 'essence' rationale in such a manner as to implement the determined effort of the Supreme Court to surround labor arbitration and the parties' collective bargaining agreement with the strongest possible measure of insulation from the displacing intrusions of courts").

[148] One of the earliest expressions of concern about judicial review of labor arbitration process is David E. Feller, *supra* note 97, at 97. This theme was amplified in Eva Robins, *The Presidential Address: Threats to Arbitration*, *in* ARBITRATION ISSUES FOR THE 1980S 1 (James L. Stern & Barbara D. Dennis eds., 1982). For more recent considerations, see Michael H. Gottesman, *How the Courts and the NLRB View Arbitrators' Awards*, *in* ARBITRATION 1985: LAW AND PRACTICE 168 (Walter J. Gershenfeld ed., 1986); Michael H. Gottesman, *Enforceability of Awards: A Union Viewpoint*, *in* ARBITRATION 1988: EMERGING ISSUES FOR THE 1990S 88 (Gladys W. Gruenberg ed., 1989); Stephen R. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, *in* ARBITRATION 1987: THE ACADEMY AT FORTY 25 (Gladys W. Gruenberg ed., 1988); Jan Vetter, *Enforceability of Awards: Public Policy Post*-Misco, *in* ARBITRATION 1988: EMERGING ISSUES FOR THE 1990S 75 (Gladys W. Gruenberg ed., 1989). *See also* William B. Gould IV, *Judicial Review of Labor Arbitration Awards–Thirty Years of the* Steelworkers Trilogy*: The Aftermath of* AT&T *and* Misco, 64 NOTRE DAME L. REV. 464 (1989).

assessment of federal court adherence to the *Trilogy*. Professors Theodore St. Antoine[149] and David Feller[150] represent this view.

This criticism is based on textual analysis of selected appellate court decisions that are perceived as influences on lower courts. There is a sound logic in this kind of analysis, but it also raises questions. First, how much are district courts influenced by these appellate decisions? This is fair to ask, because vacatur cases are fact-specific. Thus, the precedential value of appellate decisions may be limited. Second, federal court critics rarely use a quantitative approach, but their conclusions are phrased in statistical terms, such as trends and tendencies. What is the aggregate behavior of courts that review labor and employment arbitration awards?

We use a different approach. We examine the outcome of all reported court decisions involving an appealed workplace arbitration award. Using keyword searches on Westlaw's Internet service, we generated an initial list of decisions that were likely to meet pre-determined criteria for inclusion in a research database.[151] Three criteria were used: the decision (1) was made either by a

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[149] Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83 (2001):

> In the halcyon days following the Second World War, labor arbitrators operated in a largely self-contained domain where the collective bargaining agreement reigned almost supreme. External civil law in the form of statutes and common-law court decisions seldom intruded. Then, as a spate of civil rights statutes and other laws aimed at protecting individual employee rights in the workplace poured forth in the 1960s and 1970s, arbitrators construing labor contracts were drawn ineluctably into the interpretation and application of this overlapping legislation. That in turn led to heightened judicial scrutiny of arbitral awards in both union and nonunion contexts.
>
> . . .
>
> Not surprisingly, increased judicial review of awards dealing with statutes whetted many courts' appetites for going further and taking a closer look at the area previously left mostly to itself—awards concerning collective agreements. At least that was true of those awards which in the courts' eyes might be seen to contravene some sort of 'public policy.'

Id. at 102.

[150] David E. Feller, *Putting* Gilmer *Where It Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253 (2000):

> Labor arbitration was . . . put on a higher plane than arbitration of commercial disputes under the FAA. Yet, as a result of the elevation of FAA arbitration in later years and the misapplication of *Enterprise Wheel*, when it comes to enforcement of awards, the reverse is now true. Labor arbitration is given less respect than commercial arbitration.

Id. at 282.

[151] For the labor-management database, we used the keyword search "TRILOGY & ARBITRATOR & AWARD & VACAT! OR CONFIRM! & UNION." For the individual

federal district or circuit court[152] pursuant to some form of federal jurisdiction,[153] (2) involved award confirmation or vacatur, and (3) had a private-sector employer and union or individual employee. A decision was not included if it failed to meet any of these criteria.[154] Pre-arbitration disputes were the most common cases that were excluded from this search. By ruling on whether a workplace dispute is arbitrable, these decisions involved a separate facet of judicial review of workplace dispute resolution. They did not present, however, the issue of court review of the arbitrator's ruling.

The date of decision also determined inclusion in the database. In a previously published study, we analyzed judicial review of labor arbitration awards from June 1960 through late June 1991.[155] For labor-management cases, we began our current research with the endpoint in our prior database. This allowed us to compare federal court behavior during the 1990s and early part of this decade with an earlier period. Thus, our search included cases decided from July 1991 through late March 2001.

For the new database on individual employment rights, we used May 14, 1991 as a cutoff. This was done to restrict our search to cases decided after *Gilmer*. During our search, we found one pre-*Gilmer* decision that reviewed an award and included it because this case was indistinguishable from post-*Gilmer* decisions.[156]

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employment rights database, we used "GILMER & ARBITRATOR & AWARD & VACAT! OR CONFIRM!."

[152] Therefore, our primary search was conducted in the "ALLFEDS" database. However, when we extended our search by keyciting *Enterprise Wheel*, some state cases reviewing arbitration awards appeared in our list. Since these decisions did not involve federal jurisdiction, they were excluded from the sample. *E.g.*, City of Chicago v. Water Pipe Extension, Bureau of Eng'g Laborers' Local No. 1092, 707 N.E.2d 257 (Ill. App. Ct. 1999).

[153] The labor-management cases were reviewed under section 301 of the Taft-Hartley Act, while individual employment rights cases were often reviewed under the Federal Arbitration Act. However, in the latter group, some cases arose under other jurisdictional grounds. *E.g.*, McNulty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567 (E.D.N.Y. 1994) (arising under the Jury System Improvements Act of 1978, 28 U.S.C. § 1875 (1994)).

[154] *E.g.*, *Water Pipe Extension,* 707 N.E.2d at 257.

[155] Michael H. LeRoy & Peter Feuille, *The* Steelworkers Trilogy *and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78, 98 (1992). This research analyzed 1148 federal district court decisions and 480 federal circuit court decisions that resulted in a court order which compelled or denied arbitration or which enforced or vacated an arbitrator's award in whole or in part. These decisions were published after June 23, 1960 and before July 1, 1991.

[156] Booth v. Hume Pub'g, Inc., 902 F.2d 925 (11th Cir. 1990) (decided June 5, 1990). *Gilmer* was decided on May 13, 1991. Although we used *Gilmer* as cutoff for nonunion cases in the same way we used the date of the *Trilogy* in our 1991 study, we also realized that *Gilmer* did not set standards for reviewing arbitration awards. Since the Supreme Court

We expanded our search for cases that met the inclusion criteria. We added cases that were cited in these decisions if they met the parameters for inclusion and did not duplicate our initial search. Next, we "KeyCited" each decision in our list to add appropriate but overlooked cases.

Finally, we "KeyCited" the Supreme Court's *Enterprise Wheel* (the *Trilogy* case that dealt specifically with judicial review of labor arbitration awards) and *Gilmer* decisions to ensure that our other search methods did not overlook other appropriate cases. All three procedures added unduplicated cases. While the samples may not contain the universe of reported arbitration award cases, they were produced by a thorough research methodology.

We used a lengthy survey form for each qualifying case. The surveys revealed the attributes of each case, including information about the arbitration facts, reasons for the losing party's appeal, the court's ruling, and the basis for the order.[157] The resulting data was coded into variables (e.g., vacatur or confirmation of the award, federal circuit in which a court made a decision). We then analyzed the data using SPSS, a statistical program for the social sciences.

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has not yet decided a *Trilogy* analog for judicial review of arbitration awards that result from this process, we saw no good reason to exclude this pre-*Gilmer* decision.

[157] Our information was limited to the published facts and reasoning in each decision. Thus, we had no access to the parties' contract, the arbitration award (except as summarized by the court decision), any evidence adduced at arbitration, or the record produced in district and/or circuit court. This prevents us from offering our own normative judgments of any arbitration decisions or court rulings (i.e., we are unable to conclude how justified or ill-advised these specific decisions and rulings were). This background is important because it explains our inability to judge whether a particular court decision is consistent or inconsistent with the *Trilogy* standards.

IV. RESEARCH FINDINGS

The first part of our analysis examines the labor-management model. Table 1 summarizes 1244 district court decisions and 543 appellate court decisions from 1960–2001.

A. *Finding 1*

Courts have confirmed awards at a consistent rate throughout this forty-one year history. District courts confirmed 71.8% of the 1008 cases decided from 1960–1991, and 70.3% of the 232 decisions in the past decade.[158] Appellate courts behaved about the same, confirming 70.5% of awards from 1960–1991 and 66.4% in the recent period.

B. *Finding 2*

Comparing recent decisions with earlier ones, the award confirmation rate dropped substantially in district courts in the Fourth and Eighth Circuits, but rose in the Ninth Circuit. Although federal courts in the aggregate were consistent in their tendency to confirm awards, their behavior varied by region. This is most evident among district courts in circuits with large sub-samples. In the past decade the confirmation rate for these courts increased in the Ninth Circuit by thirteen percentage points. Although the Tenth Circuit had only seven award confirmation cases from 1991–2001, it confirmed all of them. Even adjusting for this very small sample size, the 45.8 percentage points increase in the confirmation rate by courts in this circuit is noteworthy.

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[158] *See infra* p. 50 tbl.1 bottom row.

Table 1
Federal Court Confirmation of Labor Arbitration Awards
July 1991-March 2001 (Bold Font)/June 1960-June 1991 (Standard Font)

Court Confirms Award (by Circuit)[159]	*Union Wins Award*	*District Decisions*	*Appellate Decisions*
1st Cir. (1991-2001) 1st Cir. (1960-1991)	**6/7 (83.3%)**	**6/7 (85.7%)** 69/94 (73.4%)	**4/5 (80.0%)** 20/29 (69.0%)
2nd Cir. (1991-2001) 2nd Cir. (1960-1991)	**33/41 (80.5%)**	**35/41 (85.7%)** 128/158 (81%)	**8/8 (100.0%)** 20/32 (62.5%)
3rd Cir. (1991-2001) 3rd Cir. (1960-1991)	**22/25 (88%)**	**21/25 (84%)** 118/148 (79.8%)	**3/7 (42.9%)** 32/39 (82.1%)
4th Cir. (1991-2001) 4th Cir. (1960-1991)	**17/20 (88.2%)**	**9/20 (45%)** 23/38 (60.5%)	**9/13 (69.2%)** 8/13 (61.5%)
5th Cir. (1991-2001) 5th Cir. (1960-1991)	**8/10 (80.0%)**	**7/10 (70.0%)** 57/96 (59.4%)	**2/5 (40.0%)** 41/55 (74.5%)
6th Cir. (1991-2001) 6th Cir. (1960-1991)	**41/47 (87.2%)**	**28/47 (59.5%)** 80/111(72.1%)	**21/31 (67.7%)** 39/62 (62.9%)
7th Cir. (1991-2001) 7th Cir. (1960-1991)	**13/15 (86.7%)**	**12/15 (80%)** 74/101(73.3%)	**4/5 (80%)** 30/43 (69.8%)
8th Cir. (1991-2001) 8th Cir. (1960-1991)	**21/24 (87%)**	**14/24 (58.4%)** 59/76 (77.6%)	**9/19 (47.4%)** 35/46 (76.1%)
9th Cir. (1991-2001) 9th Cir. (1960-1991)	**15/20 (75.0%)**	**15/20 (75.0%)** 67/108 (62.0%)	**12/15 (80.0%)** 47/66 (71.2%)
10th Cir. (1991-2001) 10th Cir. (1960-1991)	**6/7 (85.7%)**	**7/7 (100%)** 13/24 (54.2%)	**2/2 (100%)** 11/17 (64.7%)
11th Cir. (1991-2001) 11th Cir. (1960-1991)	**11/11 (100%)**	**5/11 (45.5%)** 9/19 (47.4%)	**2/5 (40.0%)** 6/11 (54.5%)
12th Cir. (1991-2001) 12th Cir. (1960-1991)	**4/5 (80.0%)**	**4/5 (80.0%)** 27/35 (77.1%)	**1/1 (100%)** 11/14 (78.6%)
Total (1991-2001) Total (1960-1991)		**163/232 (70.3%)** 724/1008 (71.8%)	**77/116 (66.4%)** 301/427 (70.5%)

Conversely, the confirmation rate dropped by 15.5 and 19.2 percentage points respectively in the Fourth and Eighth Circuits. Meanwhile, district courts

[159] First Circuit (ME, NH, MA, RI), Second Circuit (NY, CT, VT), Third Circuit (PA, NJ, DE), Fourth Circuit (MD, WV, VA, NC, SC), Fifth Circuit (MS, LA, TX), Sixth Circuit (MI, OH, KY, TN), Seventh Circuit (IL, IN, WI), Eighth Circuit (AR, MO, IA, MN, ND, SD, NE), Ninth Circuit (CA, AL, HA, OR, WA, ID, MT, NE, AZ), Tenth Circuit (CO, WY, UT, KS, OK, NM), Eleventh Circuit (GA, FL, AL).

in two circuits where a high number of cases occur had fairly constant rates over these periods. Confirmation rates for courts in the Second and Third Circuits increased by 4.7 and 4.2 percentage points.

C. *Finding 3*

Awards that were challenged in federal courts almost always ruled in favor of a union. Unions prevailed in 84.9% of the arbitration awards.[160]

D. *Finding 4*

During the recent decade, confirmation rates varied only moderately by the type of issue upon which awards were challenged.[161] The most effective argument for contesting an award was that it failed to draw its essence from the agreement. District courts confirmed 70.4% of these awards. The least effective argument for vacating an award was that the arbitrator made a fact-finding error. In cases raising this argument, the award enforcement rate was 82.1%. The confirmation rate for awards challenged on public policy grounds fell in this range. District courts confirmed 71.4% of these awards. The range between these extremes was not large.

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[160] Awards in 197 of the 232 underlying arbitrations (eighty-five percent) ruled in favor of unions. This result is similar to our earlier study that found unions prevailed in eighty percent of appealed awards. *See* Peter Feuille & Michael LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, ARB. J., Mar. 1990, at 35, 42.

[161] *See infra* p. 52 tbl.2. We call attention to the fact that the overall confirmation rate is lower than the rate for any of the five issue categories that appear in Table 2. This odd result is explained by the fact that our computation of the overall confirmation rate included cases in which courts did not state the specific issue for appealing an award. SPSS treated these as missing cases when we analyzed sub-samples of decisions where courts specifically reported the *Trilogy* issues upon which an award appeal was based. Three percent of the cases in the entire sample were treated as missing for these issue analyses.

Table 2
Judicial Review of Labor Arbitration Awards
(July 1991-March 2001)
Confirmation of Awards by Trilogy Issues

	Court Confirms Award		
	Union Wins Award	*District Court*	*Appellate Court*
Total Appealed Awards	197/232 (84.9%)	163/232 (70.3%)	77/116 (66.4%)
Basis for Challenging Award			
Arbitrator exceeded authority	82/97 (84.5%)	74/97 (76.2%)	29/43 (67.4%)
Award did not draw its essence from collective bargaining agreement	136/152 (89.5%)	107/152 (70.4%)	53/80 (66.3%)
Arbitrator made fact-finding error	22/28 (78.6%)	23/28 (82.1%)	7/13 (53.9%)
Award violated a public policy	71/84 (84.5%)	60/84 (71.4%)	30/41 (73.2%)
Award procured by bias or fraud	4/8 (50.0%)	6/8 (75.0%)	0
* Since some cases raised two or more issues, figures do not sum to sample size.			

Next, we examine court review of employment arbitration awards.[162]

E. *Finding A*

Challenges to employment arbitration awards are a recent development. Our search produced only fifty award-confirmation cases. Among the thirty-four district court decisions for which data was available,[163] almost one-third (34.8%) occurred in 2000 (no cases have been reported yet in 2001). Another thirteen percent were handed down in 1999. Thus, about half of the decisions in this sample were decided since 1999. The remaining decisions were scattered from

[162] *See infra* pp. 54–56 tbl.3.

[163] We located twenty-three district court cases. Another eleven cases resulted from circuit decisions that contained a summary of arguments and rulings made in an unpublished district court ruling. Usually, the decision year for these unpublished cases was not disclosed in the appellate opinion.

1991–1998, with one peak occurring in 1997 (17.4%). About two-fifths (43.8%) of the appellate decisions occurred in 2000 or 2001.

F. *Finding B*

Approximately two-thirds of these cases (61.8%) involved the securities industry. This result was not unexpected since these employers have been at the forefront of utilizing individual employment arbitration.[164] Thus, our sample contained some atypical employment disputes. For example, two cases involved high level executives who received multi-million dollar awards for their pay claims.[165]

G. *Finding C*

The sample contained a substantial amount of employment discrimination claims. About 56% of the cases involved Title VII claims (all but one complained of race and/or sex discrimination), and 26% of the cases had ADEA claims. Almost 40% of the employees in these disputes were female, and 18% were African-American.

H. *Finding D*

Terminations where the employer's action triggered most of the arbitrations (81.3%). Pay and bonus issues trailed far behind (12.5%), as did demotions (6.3%).

I. *Finding E*

Employers prevailed in 67.6% of the awards. In the 26% of awards in which employees received money, the median was $90,355.

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[164] *See* REGISTERED REPRESENTATIVES, *supra* note 18. The GAO study reported that only eighteen employment arbitrations occurred in the securities industry between August 1990 and December 1992. During 1991 and 1992, 1110 arbitrations occurred, most of which dealt with customer complaints.

[165] Brown v. Coleman Co., 220 F.3d 1180 (10th Cir. 2000); Prudential Bache Sec., Inc. v. Tanner, 72 F.3d 234 (1st Cir. 1995).

J. *Finding F*

Employees were much more likely than employers to sue to vacate an award (76% to 24%).

K. *Finding G*

Employers won about 67% of these award challenge cases before district courts and 63% before courts of appeal.

Table 3
Judicial Enforcement of Individual Arbitration Awards (1990-2001)

*Industry**		
Securities	21/34	61.8%
Non-Securities	12/34	35.3%
Manufacturing	1/34	2.9%
*Employee Characteristics***		
Female	10/26	38.5%
African-American	6/34	17.6%
*Underlying Legal Claims****		
Title VII [Federal]	13/23	56.5%
ADEA [Federal]	6/23	26.1%
ADA [Federal]	2/23	8.7%
Other [Federal]	2/23	8.7%
Unjust Dismissal [State]	3/19	15.8%
Emotional Distress [State]	3/19	15.8%
Defamation [State]	2/19	10.5%
Fraud [State]	2/19	10.5%
Antidiscrimination [State]	5/19	26.3%
Breach of Contract [State]	4/19	21.1%

*Employer Action*****		
Discharge/Termination	25/32	81.3%
Demotion	2/32	6.3%
Pay/Bonus	4/32	12.5%
Who Wins Award?		
Employer	21/34	61.8%
Split Award	6/34	17.6%
Employee	7/34	20.6%
Amount of Award (N=9 awards)		
Range:	$57,605–$3,617,935	
Median:	$90,355	
Who Challenges Award in Federal District Court *****		
Employee	25/33	75.8%
Employer	8/33	24.2%
Who Wins Award Challenge in Federal District Court		
Employee	11/34	32.4%
Employer	23/34	67.6%
Federal District Court Ruling on Award		
Confirm Full Award	29/34	85.3%
Confirm Part Award	1/34	2.9%
Vacate Award	4/34	11.8%
Who Wins Award Challenge in Federal Appeals Court		
Employee	6/16	37.5%
Employer	10/16	62.5%
Federal Appeals Court Ruling on Award		
Confirm Full Award	13/16	81.3%
Confirm Part Award	0	
Vacate Award	3/16	18.7%

Federal Appeals Court Ruling on District Court Decision		
Affirm Decision	9/16	56.3%
Affirm Decision in Part	2/16	12.5%
Reverse Decision	5/16	31.3%
Sample Characteristics		
Federal District Court Decisions		34
Federal Appellate Court Decisions		16
Challenged Awards		
Awards Appealed to Federal Courts:		34

* Examples include telecommunications, consumer products, and law firms.
** Court decisions inconsistently reported this information, but this incomplete data is included to show the minimum extent that women and African-Americans were compelled to arbitrate their employment disputes.
*** Plaintiffs sometimes cited multiple causes of action; we coded the primary cause of action.
**** Two cases did not report the adverse action taken or alleged to be taken by the employer.
***** In one of the 34 cases, both parties challenged the award.

L. *Finding H*

Courts confirmed a high percentage of employment awards. Respectively, district and appellate courts enforced 85% and 81% of challenged awards.

M. *Finding I*

District and appellate courts in the First and Second Circuits enforced fifteen of nineteen awards, for a confirmation rate of 79%. This rate was lower than the

rest of the nation, where district and appellate courts confirmed twenty-eight of thirty-one awards, for a rate of 90%.[166]

V. BEHIND THE NUMBERS: TEXTUAL ANALYSIS OF FEDERAL COURT DECISIONS

A. *What Is an Appropriate Range of Award Confirmation Rates for Federal Courts?*

Our methodology questions the conventional approach for assessing judicial review of arbitration awards. The conventional method relies heavily upon textual analysis of selected appellate cases. We believe this approach can be improved by statistical analysis of a large number of court decisions. We also recognize, however, that a study based solely on statistics is likely to disembody vital information about judicial behavior. In this part of our analysis, we analyze why some courts vacated awards. We agree with the widely held view that some judges exceed the boundaries of judicial review set forth in the *Trilogy*, but we also believe that two other reasons contribute to the vacatur results presented above: the arbitrator's faulty decisionmaking or conduct, and the arbitration system.

Just as previous studies of judicial review of arbitration awards rely too heavily on textual analysis of a few cases, a statistical study could disembody judicial decisionmaking by examining only numbers. In this Part of our discussion of empirical findings, we offer a matrix to explain the statistical trends that are reported as findings. This framework links our statistical findings in Part IV, with our ultimate conclusions in Part VI.

This framework differs from the research mainstream that treats a court decision to vacate an award as an external threat to the arbitration system. We believe it is better to consider the full range of empirical possibilities to deduce reasonable parameters for award confirmation rates. In short, objective guidelines should be in place before evaluating federal court adherence to the *Trilogy* and FAA standards. These boundaries should reflect the paradox built into judicial review standards for arbitration: the arbitrator's award should be reviewed with great deference, but not automatically confirmed.

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[166] We coded one case as having a partially confirmed award (McWilliams v. Logicon, No. CIV. A. 95-2500-GTV, 1997 WL 383150 (D. Kan. June 4, 1997)). The arbitration involved a disability discrimination claim against the employer. *McWilliams*, 1997 WL 383150, at *1. The district court confirmed the award but ordered the employer to pay the arbitrator's fees. *McWilliams*, 1997 WL 383150, at *1. Since the court upheld the merits of the award, *McWilliams*, 1997 WL 383150, at *2, we treated the case as an award confirmation for this computation.

What does this mean in statistical terms? There is no ideal figure or range, but the process of elimination narrows the possibilities for reasonable estimates. The easiest confirmation rates to eliminate are 100% and 0%. The former would mean that courts rubber stamp arbitration rulings.[167] Zero percent is just as unacceptable.[168]

Next, confirmation rates ranging from 1% to 49% would clearly indicate judicial failure to implement the deferential standards promulgated by the Supreme Court.[169] If courts failed to enforce a majority of awards, this heightened scrutiny would convert arbitrations into pre-trial maneuvers. The main economic reasons for parties to use arbitration—comparative speed, efficiency, and procedural simplicity[170]—would be lost. The widespread use today of labor and individual arbitration is compelling evidence for rejecting these confirmation rates as a desirable range of judicial outcomes.

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[167] *E.g.*, Matteson v. Ryder Sys., 99 F.3d 108, 113 (3d Cir. 1996) ("[T]he courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators."); Leed Architectural Prod., Inc. v. United Steelworkers, Local 6674, 916 F.2d 63, 65 (2d Cir. 1990) ("Effusively deferential language notwithstanding, the courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators. This great deference, however, is not the equivalent of a grant of limitless power.").

[168] *See* Hawaii Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv., 241 F.3d 1177, 1184 (9th Cir. 2001):

> All of these components—statutes, case decisions, principles of contract law, practices, assumptions, understandings, the common law of the shop and "the industrial common law"—are part of what is known as the federal labor law. Moreover, it is the general understanding, indeed it is the keystone of the national labor policy announced in the *Steelworkers Trilogy*, that skilled labor arbitrators, rather than judges, are better positioned and equipped to identify and to apply the common law of the shop.

Id. at 1184 (quoting McKinney v. Emery Air Freight Corp., 954 F.2d 590, 595 (9th Cir. 1992)).

[169] *Id.* at 1182 ("[E]ven if we were to disagree with the arbitrator's approach, it is not our task to intrude into the arbitration process and substitute our judgment for his. Our role here is severely limited compared to our routine de novo review of a district court's interpretation of contract language.")

[170] *See* Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001). See also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, where the Court stated,

> So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.

Id. at 38.

Applying the reasoning of George L. Priest and Benjamin Klein,[171] we also reject a 50% confirmation rate. Their model predicts that the tendency for plaintiffs to prevail at trial approaches a probability of 50% as the fraction of cases going to trial approaches zero.[172] When a legal rule or the adjudicator clearly favors one side, rational disputants avoid the high transaction costs of litigation.[173] Thus, only cases in which the parties disagree on the predicted outcome of an adjudication go to trial.[174]

If courts vacated 50% of arbitration awards, losers at arbitration would be less inclined to abide by their promise to accept these rulings as final and binding.[175] Thus, losing parties would be encouraged to treat arbitrations merely as pre-trial maneuvers, thereby defeating the purpose of this dispute resolution method.[176]

This leaves a range of 51% to 99% as candidates for optimal confirmation rates. It is reasonable to reject confirmation rates between 51% and 59% as undesirably low. Judicial behavior in this range would also invite sore losers to appeal awards. At the other extreme, confirmation rates between 91% and 99% would imply too much judicial deference to clearly erroneous rulings or awards that violate a public policy.

We therefore conclude that award confirmation rates ranging from 60% to 89% reflect judicial deference without abandonment of reviewing responsibilities. This framework establishes a reasonably objective basis for reaching conclusions about federal court performance under the *Trilogy* and

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[171] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). See also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991), where the authors comment,

> A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.

Id. at 320.

[172] *See* Priest & Klein, *supra* note 171, at 19–20.

[173] *Id.* at 16.

[174] *Id.*

[175] *E.g.*, Office & Prof'l Employees Int'l Union, Local 2 v. Washington Metro. Area Transit Auth., 724 F.2d 133, 138 (D.C. Cir. 1983) ("Congress chose words which create the expectation of [award] finality, of decisions not subject to judicial second-guessing.").

[176] *See* Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (noting "'[a]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'") (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993)).

FAA. In addition, this framework allows consideration of inputs in the award review process that generate undesirably low *or* high confirmation rates.

Our logic is supported by a small and emerging body of empirical research on the decision making behavior of federal courts that exercise appellate review. The most similar research is Professor James J. Brudney's analysis of 1224 National Labor Relations Board (NLRB) decisions from 1986 to 1993 that were appealed by employers or unions to federal courts.[177] In these cases, in which the Board ruled that an employer or union committed one or more unfair labor practices under the National Labor Relations Act. Similar to arbitration awards, these cases involved either an employer or a union who lost a final order that resulted from an adjudicatory process, and appealed that outcome to a federal court.[178]

Professor Brudney examined the NLRB's own evidence of Board orders that were enforced by federal courts. In the aggregate from 1960–1992, federal courts fully enforced 66.9% of NLRB orders.[179] The rate of success varied, however, in this lengthy period: "it was below 60 percent in the 1960s, rose to 72% in the early 1970s before declining slightly to 65 percent in the early 1980s, and was above 75% from 1985–1992."[180] Expanding on the Board's own research, Professor Brudney analyzed specific issues and outcomes that unions and employers appealed.

In a key general finding, federal courts reversed 19.7% of Board rulings that found employers liable for committing unfair labor practices.[181] The reversal rate for Board findings of union liability was 14.7%.[182] Restating these results in terms of a confirmation rate, we note that federal courts enforced nearly 80% of Board orders finding an employer liable, and about 85% in cases of union liability.

Additional support for our suggested empirical range is provided by a study of appealed patent adjudications by Professor Kimberly A. Moore.[183] She studied the recent litigation explosion of patent cases tried either before a judge

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[177] James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939 (1996).

[178] Under the NLRA, as amended, "the courts of appeals are authorized to review, enforce, and set aside the Board's decisions." *Id.* at 943 n.13.

[179] *Id.* at 970 n.93 (citing 25 NLRB ANN. REP. tbl.19 (1960) through 57 NLRB ANN. REP. tbl.19 (1992)).

[180] *Id.*

[181] *Id.* at 976 tbl.3.

[182] *Id.*

[183] Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365 (2000).

or jury. Although jury trials have been provided by federal law since 1790,[184] there has been a presumption that these cases are too complex for lay people empaneled to act as a jury. At various times from 1940 through 1970, less than 3% of patent adjudications were tried before a jury, but from 1997 to 1999, juries decided 59% of these adjudicated disputes.[185]

The main thrust of Professor Moore's study was to see whether federal appeals courts were more inclined to overturn verdicts by juries than judges.[186] Contrary to the expectation that appeals courts overturn a greater percentage of jury verdicts, she found the same affirmance rate—78%—for judge and jury verdicts.[187]

We also found an empirical study on state appellate review of death penalty sentencing which broadly mirrored results for federal courts.[188] Professors John Blume and Theodore Eisenberg analyzed cases of direct appeals of death penalty sentences reported on Westlaw from 1995 to 1997 for twenty-one states.[189] These states were analyzed because they accounted for 3112 of the 3208 state prisoners (97%) under a death sentence as of December 31, 1996.[190] The authors compared the death penalty reversal rate for persons who were re-sentenced to death after prevailing on an initial appeal with those who were not re-sentenced.[191] By dividing the sample like this, the authors were testing the assumption that persons who are re-sentenced to die are more "death-worthy" than others.[192] They found that nine of fifty-seven re-sentencing convictions (16%) were reversed on appeal compared to reversal in 154 of the 754 cases (20%) not involving re-sentencings.[193]

How do these empirical studies of appellate court review inform our analysis? First, although they generally confirm the abstract range we present here, they also imply a more precise range for appropriate award confirmation rates. The lowest aggregate affirmance rate was nearly 67% for NLRB orders

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[184] *Id.* at 366 n.3 (citing Act of April 10, 1790, ch.7, § 4, 1 Stat. 109, 111).

[185] *Id.* at 366.

[186] *Id.* at 367.

[187] *Id.* at 397.

[188] John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999).

[189] *Id.* at 480–81.

[190] *Id.*

[191] *Id.* at 490.

[192] *Id.* ("The subsequent re-sentencing to death, the subject of appeal in our data, could be taken as some evidence that these cases are death-worthy or that the arguments against death were not forcefully marshalled.").

[193] *Id.*

enforced by federal courts,[194] while the highest affirmance rates were approximately 84% for re-sentenced death penalties[195] and 85% for NLRB orders that imposed liability on employers.[196]

Second, the NLRB and patent studies involved legal disputes where there is a presumption that the original tribunal has subject matter expertise. This is similar to the *Trilogy*'s assumption that labor arbitrators are better suited than judges to resolve grievances.[197] Appellate courts are expected to engage in a very narrow review in appeals of NLRB and patent-court orders.[198] In sum, studies of these appeals suggest that courts may behave consistently across a range of subject-matter appeals as a function of the highly deferential legal standard they are compelled to apply.

Finally, these federal judiciary studies remind us that these courts are neither labor nor patent tribunals, but courts of general subject matter jurisdiction under Article III of the U.S. Constitution.[199] Their behavior in reviewing arbitration awards may be influenced by their general role in adjudicating different types of specialized disputes in which these courts readily acknowledge that they lack subject matter expertise. In sum, whatever a judge may learn about reviewing a

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[194] Brudney, *supra* note 177, at 970 n.93.

[195] Blume & Eisenburg, *supra* note 188, at 490.

[196] Brudney, *supra* note 177, at 976. *See infra* pp. 54–56 tbl.3.

[197] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960).

[198] Federal courts do not disturb the NLRB's fact findings as long as they are supported by substantial evidence. *E.g.*, Geske & Sons v. NLRB, 103 F.3d 1366, 1375 (7th Cir. 1997) ("As long as the Board's determination is premised on substantial evidence, its conclusion is both valid and binding on this court."). The Board's legal conclusions, however, are reviewed de novo. *E.g.*, NLRB v. CWI of Md., Inc., 127 F.3d 319, 330 (4th Cir. 1997). In a similar vein, federal courts in patent cases have reviewed questions of law "without deference to the views of the Agency." *E.g.*, *In re* Brana, 51 F.3d 1560, 1568 (Fed. Cir. 1995). However, with regard to questions of fact, courts defer to the Patent Office unless its findings are "clearly erroneous." *Id.*

[199] U.S. CONST. art. III, § 1, provides in pertinent part, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish." Although Article III powers are very broad, they are limited by the cases and controversies requirement. U.S. CONST. art. III, § 2, cl. 1. As a practical matter, basic concerns for federalism also limit federal court jurisdiction when the legislative or executive branches "ha[ve] the power of ultimate determination." Comment, *The Distinction Between Legislative and Constitutional Courts*, 43 YALE L.J. 316 (1933). The point is that even though federal courts have finite jurisdiction, it is so comprehensive that no judge can be a subject-matter expert for every dispute. Thus, when Congress delegates an adjudicatory or fact-finding function to an administrative agency, while reserving a limited reviewing role for courts, it is natural for judges to be reluctant to second-guess these original jurisdiction fora.

technical case in patent or labor law may be imported to disputes involving workplace arbitration.[200]

B. *A Matrix for Analyzing the Range of Award Confirmation Rates*

In Chart 1 we hypothesize that multiple inputs may account for abnormally low or high award confirmation rates. Both arbitration systems—the labor-management and individual employment systems — include (1) the judge, (2) the arbitrator, or (3) a particular feature of the arbitration system. In the following discussion, we provide textual analysis of cases that fit into each of these categories—for example, a court decision in which a judge was too meddlesome, or an arbitrator's decision or conduct that was so odd that the arbitrator must be held responsible for vacatur of her award. We also discuss how systemic factors contributed to court decisions that depart from the *Trilogy* norm.

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[200] A psychological explanation of this thought process is provided by Chris Guthrie et al., *Inside the Judicial Mind,* 86 CORNELL L. REV. 777, 805–06 (2001). A "representativeness heuristic" occurs when "people make categorical judgments" that "evidence being analyzed . . . is representative of the category." *Id.* at 805. Thus, when "the evidence appears representative of, or similar to, the category . . . people judge the likelihood that the evidence is a product of that category as high." *Id.* This may apply when judges apply narrow review standards such as those imposed by the *Trilogy* and its progeny.

For example, *Eastern* instructs a judge that if an "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision." E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000) (quoting United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960)). The judge may equate this to a similar standard of review in a patent dispute in *Dickinson v. Zurko*, 527 U.S. 150 (1999). In that case, the Court dealt with judges who set aside findings of fact by the U.S. Patent and Trademark Office. *Id.* Some judges applied the highly deferential "clearly erroneous" standard, while others used less deferential standards under the Administrative Procedure Act (allowing a court to set aside fact-findings that are arbitrary or capricious, or result from abuse of discretion, or are unsupported by substantial evidence). Although the *Dickinson* Court ruled in favor of the more permissive APA standards—and thus, appeared to give federal courts more authority to overturn Patent Office than labor arbitrator decisions—this example shows how judges could mistakenly categorize fact-finding reviewing standards in the heuristic described by Guthrie et al.

Chart 1
Sources of Deviation in Award Confirmation Rates

		Actor or Institution	
Labor-Management Arbitration	Cell 1 Federal Judge	Cell 2 Arbitrator	Cell 3 Arbitration System
Individual Employment Arbitration	Cell 4 Federal Judge	Cell 5 Arbitrator	Cell 6 Arbitration System

1. *Cell 1 (Labor-Management Arbitration)—The Judge*

Our database includes many cases that validate widely held concerns about judicial review of awards. The district court decision in *Tennessee Valley Authority v. Tennessee Valley Trades & Labor Council*[201] is a case in point.

Robert Ingle, a nuclear power plant operator with seventeen years of employment, was fired after he tested positive for marijuana.[202] By company policy he was referred to the Employee Assistance Program (EAP).[203] Ingle applied for admission, but during processing he received conflicting information about his enrollment.[204] One doctor approved him but another believed he had no drug problem and therefore declined his admission.[205] By the time this confusion was cleared up, the company had deactivated Ingle's clearance and fired him.[206]

The arbitrator, a former labor relations manager for Tennessee Valley Authority (TVA), reinstated Ingle with backpay.[207] He based his ruling on positive assessments of Ingle made by his supervisors at the arbitration

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[201] Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council, 184 F.3d 510 (6th Cir. 1999).

[202] *Id.* at 512.

[203] *Id.*

[204] *Id.*

[205] *Id.* at 512–13.

[206] *Id.* at 513.

[207] *Id.*

hearing.[208] The arbitrator also noted that the EAP was designed for this kind of occasion and the company put Ingle in an intolerable Catch-22 situation.[209]

In suing to vacate the award, TVA contended that the arbitrator's decision failed to draw its essence from the collective bargaining agreement (CBA).[210] Ruling in favor of TVA and vacating the award, the district court reasoned that the CBA "must be 'read in the light of the relevant provisions of the Framework Agreement,' which is 'key to understanding the nature of labor-management relations governed by the [CBA].'"[211]

The Sixth Circuit reversed and granted enforcement of the award,[212] adding this rebuke: "The district court's conclusion otherwise led it to substitute its own notions of industrial fairness for that of the arbitrator. This result is problematic because proper resolution of employee grievances is a subject matter in which courts have little expertise."[213]

2. *Cell 2 (Labor-Management Arbitration)—The Arbitrator*

The research literature rarely singles out arbitrators as part of the problem of heightened judicial review. However, our database contains several highly unusual arbitration awards.

Consider the embarrassing case of *Flexsys America, L.P. v. Local Union No. 12610*.[214] A worker was suspended for thirty days after he argued with his supervisor.[215] At the end of a contentious hearing, the arbitrator asked some questions and the attorneys agreed to leave the arbitration open for the submission of a final brief.[216] Later, the arbitrator called the company's attorney and held an ex parte conversation.[217] Although briefs had not been submitted, he announced to the attorney that he had already come to a decision on the merits.[218] He said that he was not going to explain his reasons but asked the

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[208] *Id.*

[209] *Id.* at 513–14.

[210] *Id.* at 516.

[211] *Id.* at 516–17 (citation omitted).

[212] *Id.* at 520.

[213] *Id.* at 516.

[214] Flexsys Am., L.P. v. Local Union No. 12610, 88 F. Supp. 2d 600 (S.D. W. Va. 2000).

[215] *Id.* at 602.

[216] *Id.*

[217] *Id.*

[218] *Id.*

attorney to reopen the arbitration to investigate the supervisor's background.[219] He then stated that if the company declined to reopen the hearing to investigate the supervisor, he would grant the grievance without explanation.[220]

The arbitrator wanted to know if the supervisor was gay.[221] While talking to the company's attorney, the arbitrator said he handled hundreds of homosexual cases in the military.[222] He believed that the supervisor was "flighty" during the hearing, and then said that if the grievant thought that his supervisor was "a queer" he would rescind the discipline.[223] After this extremely inappropriate conversation ended, the employer's attorney contacted her union counterpart to have the arbitrator removed from the case, but her request was declined.[224]

The arbitrator then issued a ruling in which he upheld the grievance and granted backpay.[225] The company believed the award "failed to draw [its] essence from the CBA," reflected the arbitrator's "own brand of industrial justice," and was biased.[226] The district court agreed, and vacated the award.[227] Considering the arbitrator's highly inappropriate post-hearing behavior, we cannot fault the reasoning and decision of the district court.

Carpenter Local No. 1027 v. Lee Lumber & Building Material Corp.[228] provides another example of arbitrator misjudgment. After the company fired the grievant, the union filed a grievance and negotiated his reinstatement.[229] The only condition that the company put on reinstating the grievant was that he return to work within seven days.[230] Unfortunately, the grievant was out of town during

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219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.* at 604. The court stated,

> There was never any evidence presented by either party that the supervisor was gay. The only individual who raised homosexuality as an issue was the Arbitrator, and that was after the arbitration hearing during an inappropriate, arbitrator-solicited, *ex parte* conversation. Accordingly, the Court finds that a reasonable person would conclude that the Arbitrator was biased, and that arbitrator bias is also an appropriate ground for vacation of the arbitration award.

Id.

228 Carpenter Local No. 1027 v. Lee Lumber & Bldg. Material Corp., 2 F.3d 796 (7th Cir. 1993).

229 *Id.* at 797.

230 *Id.*

this time, and union officials did not track him down.[231] However, the union contacted him nine days after entering into this settlement and told him to report to work.[232] By then, the company withdrew its offer.[233] The union then refiled the grievance and prevailed at arbitration.[234] The arbitrator issued a strange remedy, however. Although the CBA expressly defined a grievance as a complaint or claim against the employer,[235] he ordered the union to reimburse the grievant for the entire amount of backpay.[236]

The union sued in district court to vacate this remedy.[237] The district court ruled for the union, and reasoned that the arbitrator exceeded his contractual authority.[238] On appeal, the Seventh Circuit affirmed this vacatur.[239] We cannot fault the reasoning and conclusion of either court in this case.

At the same time, we also found cases of remarkable judicial restraint when arbitrators used what the courts believed was extremely poor judgment. We highlight two cases because they demonstrate potentially serious consequences when courts adhere to the *Trilogy*'s highly deferential review standards.

In *Jacksonville Area Ass'n for Retarded Citizens v. General Service Employees Union, Local 73*,[240] a private-sector non-profit corporation provided care for physically and mentally impaired residents.[241] One morning four employees left their regular place of work to visit another building to see if a

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[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] The Seventh Circuit stated,

> Not only does the collective bargaining agreement strongly imply that the arbitrator could not impose the reimbursement remedy he imposed in this case, we think it is clearly implausible to suppose the parties ever contemplated that remedy. Given the arbitration clause the parties did agree to, it is 'almost unimaginable' that the union would have agreed to the type of remedy imposed here if the question had arisen during bargaining.

Id. at 799 (quoting Miller Brewing Co. v. Brewery Workers Local No. 9, 739 F.2d 1159, 1164 (7th Cir. 1984)).

The court also reasoned "that Lee and the union did not agree to arbitrate any claims other than those by the union or an employee against Lee." *Id.*

[240] Jacksonville Area Ass'n for Retarded Citizens v. Gen. Serv. Employees Union, Local 73, 888 F. Supp. 901 (C.D. Ill. 1995).

[241] *Id.* at 903.

patient was a hermaphrodite.[242] Finding this resident in a classroom, they removed him to the restroom to be toileted.[243] Once there, one worker positioned himself at the door while another lowered the client's pants in the presence of the other two employees.[244] After satisfying their curiosity, the employees returned the client to the classroom.[245] Once co-workers reported this incident, the employer conducted a formal investigation and then fired these offenders.[246]

The arbitrator found that the employees' conduct was improper, but because he believed termination was too severe, he reduced their punishment to an unpaid suspension.[247] The employer contended—and the reviewing court agreed—that the workers abused this client.[248] A variety of Illinois[249] and federal[250] laws prohibit mistreatment of confined mental patients. The district court believed that "one cannot persuasively argue against the existence of a strong public policy prohibiting the abuse of mentally impaired individuals."[251] Nevertheless, it denied the employer's motion to vacate the award, but with obvious reluctance.[252]

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[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.* at 904.

[248] *Id.* at 906 ("In the instant matter, there does not appear to be a dispute concerning the existence of a public policy supporting the prohibition and prevention of the abuse of mentally impaired individuals. Indeed, there are several statutes that support this conclusion.").

[249] *Id.* at 906–07 (citing, inter alia, § 2–112 of the Illinois Mental Health and Developmental Disabilities Code, 405 ILL. COMP. STAT. ANN. 5/2–112 (West 1992) ("Every recipient of services in a mental health or developmental disability facility shall be free from abuse and neglect . . . ."); § 5–101 of the Illinois Mental Health and Developmental Disabilities Code, 405 ILL. COMP. STAT. ANN. 5/1–101.1 (West 1992) (defining abuse as "any physical injury, sexual abuse, or mental injury inflicted on a recipient of services other than by accidental means")).

[250] *Id.* at 907 (citing the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801–10851 (1994) & Supp. IV 1998).

[251] *Id.* at 907.

[252] *Id.* at 908–09. "[T]he court . . . is deeply disturbed and utterly revolted by the employees' conduct underlying this action. We can confidently state that if we were arbitrating the instant dispute, the employees would not have been reinstated to their former positions." *Id.* at 909. The court continued, "However, that is not the issue here. The parties contractually agreed to have an arbitrator interpret the disciplinary provisions of their employment agreement and now the JAARC must live with that decision." *Id.*

A bus company discharged a driver after he was involved in his twenty-fourth accident during a twelve year career in *United Transportation Union Local 1589 v. Suburban Transit Corp.*[253] The last accident occurred on the New Jersey Turnpike as the driver rear-ended a tractor trailer because he was tailgating.[254] In the past, nine of the driver's accidents were deemed to be preventable.[255] This was his third preventable rear-end collision.[256]

The arbitrator found that the driver was responsible for the accident.[257] He also determined that the driver was a "veteran employee who has given loyal service to his company for some twelve years."[258] In addition, he concluded that the company did not adequately train the driver.[259] He reversed the discharge and ordered the company to provide the driver more training.[260]

The bus company sued to vacate the award, and the district court granted its motion.[261] On appeal, the Third Circuit reversed the district court.[262] Analyzing whether the arbitrator exceeded his powers, the court said that "the parties bargained for contractual ambiguity instead of defining 'proper cause' in the CBA. Having decided not to define the phrase, Suburban cannot escape the results of that bargain simply because the arbitrator has chosen to interpret that phrase differently than Suburban may have wanted . . . ."[263]

Nevertheless, the appeals court conceded that the arbitrator's judgment was faulty when the court acknowledged that "Suburban's interpretation of the CBA is more reasonable than the result announced by the arbitrator."[264] In addition, although the court recognized that the award posed a potential threat to public safety, it found that the award did not violate an express public policy.[265] In sum,

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[253] United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 379 (3d Cir. 1995).

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.* at 380.

[259] *Id.* at 379.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.* at 380 (discussing News Am. Publ'ns, Inc. v. Newark Typographical Union, Local 103, 918 F.2d 21, 24 (3d Cir. 1990)).

[264] *Id.*

[265] *See id.* at 382. "We acknowledge that public transportation safety is a valid public concern, but Suburban has failed to demonstrate that public policy requires vacation of the arbitrator's award here." *Id.*

the Third Circuit's application of the *Trilogy* and *Misco* was legally correct, but hindered the bus company's efforts to provide safe travel for its customers.

3. *Cell 3 (Labor-Management Arbitration)—The Arbitration System*

This cell addresses our finding for 1991–2001 that appellate courts confirmed 73.2% of awards that were challenged on public policy grounds. As we noted, this confirmation rate is similar to cases where an appeal was based on some other issue. For example, the award fails to draw its essence from the agreement. Thus, this issue does not warrant the concern that it has received since *Misco* was decided.

Our database suggests that there is more to this story, however. When appellate courts vacate awards on public policy grounds, the underlying dispute usually involves the termination of an employee who was discharged for drugs or alcohol. The new dimension appearing in our database is that courts still exercise restraint in these cases but make an exception when the work setting poses a strong safety concern to the public.

As evidence of this tendency, we highlight three vacatur decisions—all involving separate events and locations—that consisted of Exxon Corporation challenges to awards that reinstated employees who were discharged for drug or alcohol violations. In *Exxon Corp. v. Esso Workers Union*,[266] the company fired a truck driver who hauled 12,000 gallons of gasoline on a public highway while under the influence of cocaine.[267] The arbitrator upheld the validity of the drug test but determined that the punishment was too severe, and therefore reduced the penalty to a two month suspension.[268] The First Circuit ruled that the arbitrator's award violated "a broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs."[269]

A 1989 accident involving a 635 foot oil tanker led to the discharge of the ship's helmsman in *Exxon Shipping Co. v. Exxon Seamen's Union*.[270] Morris Foster was drug-tested after he ran his ship aground in the Mississippi River.[271]

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[266] Exxon Corp. v. Esso Workers Union, 118 F.3d 841 (1st Cir. 1997), *overruled in part by* E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 61 (2000).

[267] *Id.* at 843–44.

[268] *Id.*

[269] *Id.* at 848. The court continued, "This consensus is made manifest by positive law and translates into a well defined and dominant public policy—indeed, a national crusade-counselling against the performance of safety-sensitive tasks by individuals who are so impaired." *Id.*

[270] Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993) (per curiam).

[271] *Id.* at 358.

Exxon administered its own drug test and one for the U.S. Coast Guard. Foster tested negative under the Coast Guard's more lenient standard, but positive for marijuana under the company's tougher standard.[272] After conducting a confirmatory test and again finding traces of marijuana in Foster, Exxon fired him.[273] The arbitration board found that Exxon's more stringent standard was not unreasonable and that the totality of the evidence conclusively established Foster's use of marijuana.[274] The arbitrators also concluded that Foster had been on vacation nine days before the accident occurred, and his test showed residual traces.[275] This meant that the company failed to prove, under the CBA, that Foster used marijuana while he was on duty.[276] The arbitrator therefore decided that the penalty was too severe and ordered the company to reinstate Foster.[277]

In court, the union contended that Coast Guard drug regulations prohibit drug use by seamen only while on duty.[278] Exxon countered that the policy also prohibits off-duty drug use.[279] The appellate court disagreed with both parties because their arguments "obscure[d] the goal of the public policy embodied in the regulations—safe operation of vessels."[280] It vacated the award, noting that "[i]n furtherance of this goal, the regulations require drug testing and authorize the imposition of stiff penalties on employees like Foster who fail drug tests."[281]

In *Exxon Corp. v. Baton Rouge Oil & Chemical Workers*,[282] Donald Chube temporarily substituted for a supervisor in a safety-sensitive position in a chemical processing plant and therefore had to take a drug test.[283] During this time, the company revised its drug testing policy over the union's objections.[284] The revision was more restrictive, because it included random testing and denied rehabilitation for employees who tested positive.[285] After the union and the

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[272] *Id.*

[273] *Id.* at 358–59.

[274] *Id.* at 359.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* at 361.

[279] *Id.*

[280] *Id.*

[281] *Id.* The court continued, "The Coast Guard regulations are part of a broader public policy against operation of common carriers under the influence of drugs or alcohol." *Id.* at 361. In support of this conclusion, the court cited an array of specific laws and regulations. *Id.* at 361–62.

[282] Exxon Corp. v. Baton Rouge Oil & Chem. Workers, 77 F.3d 850 (5th Cir. 1996).

[283] *Id.* at 851.

[284] *Id.* at 851–52.

[285] *See id.* at 852.

company negotiated to impasse, Exxon unilaterally implemented the revised policy and said it would become effective on September 1, 1989.[286]

On August 24, Chube tested positive for cocaine use.[287] Exxon fired him on September 13, citing him for violating the newly implemented drug policy.[288] The arbitrator determined that the issue was whether Chube violated the policy, not if Exxon had a right to terminate an employee who tested positive for cocaine.[289] He then concluded that Exxon violated the CBA by discharging Chube because the employee did not violate a posted rule.[290] His award required Exxon to reinstate Chube with full back pay.[291] The arbitrator also provided an alternative award of one year's backpay.[292] He did this because Chube was incarcerated *after* his discharge for selling drugs and therefore was unavailable for reinstatement.[293]

Exxon sued to vacate the award, but the district court denied this motion.[294] On appeal before the Fifth Circuit, the company's motion to vacate was granted.[295] Exxon contended that the award violated public policy because it ordered reinstatement of a cocaine user and convicted drug dealer to a safety-sensitive job.[296] The union argued that the alternative award, ordering only backpay and not reinstatement, violated no public policy.[297] Finding this a close case, the court vacated the award, reasoning that,

> the public policy exception . . . must be read not only to prohibit the prospective placement of an employee into a position where he is a danger to his company and to fellow employees . . . but also to prohibit a retrospective approval of the conduct that created the unsafe situation in the first place.[298]

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286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.*

290 *Id.* at 852–53.

291 *Id.* at 853.

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.* at 857.

296 *Id.* at 854.

297 *Id.*

298 *Id.* at 856. The court continued, "In addition to addressing future conduct, the public policy against drug use in safety-sensitive positions also must look back to the conduct that is the subject of the grievance. The policy looks to the future to ensure safety, but looks back to deny condonation of misconduct." *Id.*

In sum, we believe that the arbitration system is responsible for producing some awards that conflict strongly with core judicial values. These conflicts are so deeply rooted that they go beyond mere disagreement between individual arbitrators and judges. To illustrate, in labor arbitration there is a powerful norm to rehabilitate an errant employee.[299] Sometimes, however, courts conclude that societal costs for enforcing this arbitral value are too high. In effect, courts are forced to choose between the judicial values embedded in the *Trilogy* and other judicial values, such as protecting the environment from an imminent catastrophe. The Exxon cases reveal this conflict. Our point is that this problem transcends individual judges and arbitrators and is systemic in nature.

Turning to the individual employment arena, we note how these arbitration cases differ from the labor arbitration model. Award confirmation cases in this arena are extremely rare but are rapidly increasing. This limited database provides the following examples of cases that tended to deflect the confirmation rate below or above the normal range.

4. *Cell 4 (Individual Employment Arbitration)—The Judge*

In all other cells in our matrix, we present decisions that vacated awards and led to lower award confirmation rates. In the very limited time that federal courts have been reviewing individual employment arbitration awards, no judge

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[299] Elkouri and Elkouri state,

> Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for his offense.

FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 679 (4th ed. 1985).

overturned an arbitrator's findings of fact or substituted judicial interpretation of contract language for an arbitrator's judgment.

We note, however, that under the *Trilogy* and the FAA, some degree of judicial review of arbitration awards is not only permitted, but is warranted. When a judge is too deferential, this amounts to failure of judicial responsibility. We pose the following decision as an example of what we believe is excessive judicial deference to an award that resulted from an aberrant arbitration process.

In *LaPrade v. Kidder, Peabody & Co.*,[300] Linda LaPrade sued Kidder Peabody for sex discrimination. Her lawsuit was stayed on June 24, 1992, pending the outcome of arbitration.[301] The first hearing occurred fourteen months later, in September 1993.[302] The arbitration process extended over seventy-four hearing and conference dates, and took six years to complete.[303] On October 8, 1999 the NASD Arbitration Panel issued its ruling denying all of LaPrade's discrimination and defamation claims.[304] The panel also ordered Kidder Peabody and LaPrade to pay, respectively, $61,424 and $8,376 for NASD forum fees.[305]

Kidder Peabody returned to court to lift the stay and confirm the award.[306] LaPrade filed a counterclaim to vacate parts of the award, including her share of forum fees.[307] The court granted Kidder Peabody's motion in its entirety.[308] Noting that it had authority to review the award under the FAA[309] as well as non-

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[300] LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2 (D.D.C. 2000).

[301] *Id.* at 4.

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Id.* at 8.

[309] *Id.* at 5 (citing the Federal Arbitration Act, 9 U.S.C. § 10 (1994)). Under the FAA, federal courts are empowered to vacate an award

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. (quoting 9 U.S.C. §10 (1994)).

statutory common law standards, the court reviewed the award under the common law standard of manifest disregard for the law.[310]

LaPrade challenged the assessment of fees, basing her contentions on *Cole v. Burns International Security Services*.[311] That case differed from LaPrade's, because the plaintiff challenged the arbitration process before an award was issued.[312] As the *LaPrade* court noted, *Cole* ruled that certain forum fees, those that equate to filing fees and other administrative expenses in a federal lawsuit, could be assessed in compulsory arbitration.[313] But the *Cole* court ruled that no arbitration fees could be charged unless a court charged a similar fee.[314]

In ruling that forum fees were not so excessive here as to constitute a manifest disregard of the law, the *LaPrade* court was impressed by the fact that "[t]he $8,376 in forum fees assessed against the complainant amount[ed] to $113.19 for each of her seventy-four hearing sessions and conferences."[315] This ruling was factually correct but missed the point made in *Cole* concerning the accessibility of arbitration to employees who are compelled to substitute this forum for a court of law. LaPrade incurred other costs in arbitrating her claims. Contrary to the reputation that arbitration has for being a comparatively quick process, her six-year hearing ordeal was no more advantageous—indeed, it was probably much slower than most civil trials.[316]

In addition, the *LaPrade* court's emphasis on cost per hearing ignored the cost of her attorney fees for this protracted process. Although *Cole* analyzed types of expenses that were chargeable to a complainant, the plaintiff in that case was not charged over $8,000 for forum fees. The main point of *Cole* is that public courts do not cost plaintiffs much in the way of direct charges; therefore, neither should

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[310] *Id.* at 5–6.

[311] *Id.* at 6–7. LaPrade contended that "under the spirit and the letter of *Cole*, she cannot be required to pay any part of the arbitration fees, much less $8,376." *Id.* at 7. In making this argument, she quoted *Cole*: "[I]t would undermine Congress' intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." *Id.* at 7 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997)).

[312] *Cole*, 105 F.3d at 1469–70.

[313] *LaPrade*, 94 F. Supp 2d at 7 (citing *Cole*, 105 F.3d at 1484).

[314] *Id.*

[315] *Id.* at 7 n.6.

[316] *See id.* at 4 (reporting that LaPrade's employment discrimination lawsuit was stayed by court order on June 24, 1992, hearings commenced in September 1993, and the arbitration panel ruled on her complaint on October 8, 1999). Compare to a typical civil trial as discussed in *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 552 (4th Cir. 2001).

an arbitration.[317] By deferring to an award that was so expensive in direct and indirect costs to a complainant, the judge in *LaPrade* legitimized the use of high process costs as a method of reducing employee access to arbitration.[318]

5. *Cell 5 (Individual Employment Arbitration)—The Arbitrator*

The district court in *DeGaetano v. Smith Barney, Inc.*[319] vacated part of an award that denied a complainant's motion for attorney fees in a sex discrimination case. In March 1995, DeGaetano sued Smith Barney, alleging that her complaints of sexual harassment by her boss were ignored.[320] In February 1996, a federal court denied DeGaetano access to a judicial forum, and compelled arbitration of her claims for sex discrimination and emotional distress.[321]

During an early phase of the arbitration, DeGaetano formally applied for recovery of her attorney fees.[322] On March 18, 1997, the arbitration panel awarded DeGaetano $90,355 in damages and interest—equal to one year of pay —but denied her petition for attorney fees.[323] While this amount was not reported, it was probably substantial because the hearing phase of her arbitration took ten days.[324]

DeGaetano sued to vacate the fee portion of her award.[325] She based her challenge on Title VII of the 1964 Civil Rights Act, as amended, providing that "the court, in its discretion, may allow the prevailing party . . . a reasonable

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[317] *See Cole*, 105 F.3d at 1484. After determining that the issue at hand was whether an employer can require an employee to arbitrate disputes and pay for the arbitration fees, the *Cole* court proclaimed:

> There is no doubt that parties appearing in federal court may be required to assume the cost of filing fees and other administrative expenses, so any reasonable costs of this sort that accompany arbitration are not problematic. However, if an employee like Cole is required to pay arbitrators' fees ranging from $500 to $1,000 per day *or more* . . . in addition to administrative and attorney's fees, is it likely that he will be able to pursue his statutory claims? We think not.

Id.

[318] *See LaPrade*, 94 F. Supp. 2d at 8. Further LaPrade's appeal was denied in LaPrade v. Kiddler, Peabody & Co., 246 F.3d 702 (D.C. Cir. 2001).

[319] DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997).

[320] *Id.* at 460.

[321] *Id.*

[322] *Id.* at 461.

[323] *Id.*

[324] *Id.*

[325] *Id.*

attorney's fee."[326] The district court adopted the common law standard that permits vacatur or modification in the rare instance "when the arbitrator[ ] acted in manifest disregard of the law."[327]

In ruling for DeGaetano, the court observed that although not couched in mandatory terms, this statute establishes a presumptive entitlement to an award of attorney's fees for prevailing parties.[328] Concluding that DeGaetano's award must have been based on a finding of employment discrimination, the court reasoned that she was a prevailing plaintiff under Title VII and therefore entitled to recover attorney fees.[329] Finally, the court found that this legal oversight was not inadvertent. It said that "the Arbitration Panel appreciated the existence of a clearly governing legal principle but decided to ignore or pay no attention to it."[330]

In *Montes v. Shearson Lehman Bros.*,[331] the Eleventh Circuit found that an arbitration award manifestly disregarded a federal wage and hour law. The Fair Labor Standards Act (FLSA) requires employers to keep track of an employee's time at work and pay overtime after forty hours per week, unless that employee falls under an appropriate managerial or related exemption. Delfina Montes was an office worker in Shearson's Hallandale branch office, and sued her employer

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[326] *Id.* at 461 n.3 (citing 42 U.S.C. § 2000e-5(k) (1994)).

[327] *Id.* at 462 (quoting Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997)). The court explained that it "should not vacate an arbitration award for manifest disregard simply because of 'error or misunderstanding with respect to the law.'" *Id.* (quoting Int'l Telepassport Corp. v. USFI, Inc., 89 F.3d 82, 85 (2d Cir. 1996)). Instead, "the term *manifest disregard* clearly means more: 'The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.' Moreover, the term *disregard* implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." *Id.* (quoting DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997) (emphasis added)).

[328] *Id.* (citing, inter alia, Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (stating "that in order to 'ensure effective access to the judicial process for persons with civil rights grievances . . . a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust'")).

[329] *Id.*

[330] *Id.* at 464 (citing DiRossa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997)). The employer also contended that an award of attorney's fees was barred here in any event by the Smith Barney Arbitration Policy. DeGaetano's employment agreement stated that "[e]ach side shall pay its own legal fees and expenses." *Id.* at 460. She maintained, however, that this contract provision was void as a matter of public policy. The court rejected Smith Barney's contention by holding that the arbitration policy conflicted with public policy by denying prevailing plaintiffs an award of attorney's fees in employment discrimination cases. *Id.* at 464–65.

[331] Montes v. Shearson Lehman Bros., 128 F.3d 1456 (11th Cir. 1997).

for failure to pay overtime.[332] Because she signed an industry arbitration agreement, her suit was dismissed and her only recourse was to arbitrate her FLSA claim.[333]

At the hearing, counsel for Shearson told the arbitration panel to ignore the FLSA.[334] The award sustained Shearson's position and failed to analyze Montes' FLSA claim.[335] She sued to vacate the award, and the district court dismissed her challenge.[336] On appeal, she challenged the arbitration panel's decision as arbitrary, capricious, and contrary to public policy.[337] Her appeal relied heavily on the transcript showing that Shearson's lawyer repeatedly told the panel to disregard the FLSA.[338]

The Eleventh Circuit reviewed the award under the FAA and common law standards.[339] Noting that it had jurisdiction under the FAA, the court used these non-statutory standards to review Montes' appeal: Was the arbitration decision (1) arbitrary or capricious, (2) in manifest disregard of the law, and (3) violative of public policy?[340] Recognizing that "each of these three grounds could conceivably be encompassed in the other, courts, including this one, have treated

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[332] *Id.* at 1458.

[333] *Id.*

[334] *Id.* at 1459. For example, the attorney said on the record, "I know, as I have served many times as an arbitrator, that you as an arbitrator are not guided strictly to follow case law precedent. That you can also do what's fair and just and equitable and that is what Shearson is asking you to do in this case." *Id.* Then, during closing arguments, he said,

> You have to decide whether you're going to follow the statutes that have been presented to you, or whether you will do or want to do or should do what is right and just and equitable in this case. I know it's hard to have to say this and it's probably even harder to hear it but *in this case this law is not right.* Know that there is a difference between law and equity and I think, in my opinion, that difference is crystallized in this case. *The law says one thing. What equity demands and requires and is saying is another.* What is right and fair and proper in this? *You know as arbitrators you have the ability, you're not strictly bound by case law and precedent.* You have the ability to do what is right, what is fair and what is proper, and that's what Shearson is asking you to do.

Id.

[335] *Id.* at 1458.

[336] *Id.*

[337] *Id.*

[338] *Id.* at 1459.

[339] *Id.* at 1459 n.5.

[340] *Id.*

these reasons as discrete and separate."[341] It then narrowed its review to "manifest disregard of the law."[342]

This analysis began by defining the extremely limited role that federal courts play in conducting this review.[343] An award cannot be reversed for error or misinterpretation.[344] However, as other circuits have found,[345] clear disregard for the law is another matter:

> When a claim arises under specific laws, however, the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so. As the Supreme Court has stated, 'by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'[346]

The Eleventh Circuit then differentiated between an award that involves an erroneous interpretation of the law, and one that involves manifest disregard: "'Manifest'" means '[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, undubitable, indisputable, evident, and self-evident.'"[347] "Disregard," according to the court, means "to treat as unworthy of regard or notice; to take no notice of; to leave out of

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[341] *Id.*

[342] *Id.*

[343] *Id.*

[344] *Id.*

[345] *Id.* (noting that most other circuits expressly recognized that manifest disregard of the law is an appropriate reason to review and vacate an award) (citing Barnes v. Logan, 122 F.3d 820 (9th Cir. 1997); Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9 (2d Cir. 1997); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844 (6th Cir.1996); Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234 (1st Cir. 1995); United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376 (3d Cir. 1995); Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957 (7th Cir. 1993); Lee v. Chica, 983 F.2d 883 (8th Cir. 1993); Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225 (4th Cir. 1991); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631 (10th Cir. 1988)). *But see* McIlroy v. PaineWebber, Inc., 989 F.2d 817, 820 n. 2 (5th Cir. 1993) (rejecting non-statutory grounds for vacating arbitration awards).

[346] *Montes*, 128 F.3d at 1459–60 (quoting Gilmer v. Interstate/Johnson Lane, Corp., 500 U.S. 20 (1991)). "[W]e have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Montes*, 128 F.3d at 1460 (quoting Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

[347] *Id.* at 1461 (quoting BLACK'S LAW DICTIONARY 962 (6th ed. 1990)).

consideration; to ignore; to overlook; to fail to observe."[348] After considering these definitions, the court concluded "that a manifest disregard for the law, in contrast to a misinterpretation, misstatement or misapplication of the law, can constitute grounds to vacate an arbitration decision."[349]

Applying this standard, the court vacated the award, noting that "we are able to clearly discern from the record that this is one of those cases where manifest disregard of the law is applicable, as the arbitrators recognized that they were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal."[350] The appeals court remanded the matter to the district court with instructions to refer the dispute to a new arbitration panel.[351]

Neary v. Prudential Insurance Co. of America was another manifest disregard case.[352] In vacating the award, the district court appeared to re-arbitrate the underlying employment dispute. We call attention to this case because, unlike *Montes*, the arbitrator was not told to disregard the law. Instead, the court concluded that the arbitrator did this on his own initiative. This decision shows that a reviewing court can exercise considerable discretion under the manifest disregard standard.

Thomas Neary alleged wrongful termination in his suit against Prudential Insurance, but the court denied Neary a trial and granted the employer's motion to compel arbitration.[353] More than a year and a half later, a panel of NASD arbitrators granted summary judgment in favor of Prudential.[354] On a motion to vacate, the district court ruled in favor of Neary.[355] The judge concluded that the factual record showed that the arbitration panel's decision to grant summary judgment in favor of Prudential was in manifest disregard of the law.[356] The panel failed to account for state law exceptions to employment at will.[357] These

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[348] BLACK'S LAW DICTIONARY 472 (6th ed. 1990).

[349] *Montes*, 128 F.3d at 1461–62 ("We emphasize again that this ground is a narrow one.").

[350] *Id.* at 1462.

[351] *Id.* at 1464.

[352] Neary v. Prudential Ins. Co. of Am., 63 F. Supp. 2d 208 (D. Conn. 1999).

[353] *Id.* at 208.

[354] *Id.*

[355] *Id.* at 209.

[356] *Id.*

[357] *Id.* at 209–10. The court noted that Neary predicated his wrongful termination claim on CONN. GEN. STAT. § 31–51(q) (1997) and *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980).

limit an employer's right to fire an employee when that person exercises a First Amendment right or the employee's conduct is protected by a public policy.[358]

Neary brought these legal standards to the attention of the arbitration panel.[359] The court then concluded, "It is unquestionable that the arbitration panel manifestly disregarded the standard for summary judgment. The record in this case provides overwhelming evidence to support an inference that Neary was wrongfully terminated."[360] The court based its decision on an inference rather than direct evidence. In a passage that suggests future grounds for expanding judicial review of awards, the court said, "The record in this case strongly indicates that the arbitration panel did not base its ruling in favor of Prudential on motion to dismiss grounds. *The failure of the panel to explain its decision complicates this determination.*"[361]

6. *Cell 6 (Individual Employment Arbitration)—The Arbitration System*

This Section presents another case that used the non-statutory standard of manifest disregard of the law. We classify *Halligan v. Piper Jaffray, Inc.*[362] in Cell 6, because the action that constituted manifest disregard of the law—an award that failed to explain the reason for denying a complaint—is not an idiosyncratic problem, but rather, is a systemic practice in this arbitration domain.

The plaintiff sued to vacate an NASD award as executrix for her husband's estate.[363] Theodore Halligan, her husband, unsuccessfully arbitrated his claim of age discrimination under the ADEA.[364] The district court dismissed a challenge

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[358] *Id.* at 210.

[359] *Id.* ("Neary clearly identified for the arbitration panel the proper and relevant legal standard for summary judgment.").

[360] *Id.* (noting that Prudential documents referred to Neary as a "union instigator" and that Prudential knew that Neary was associated with a terminated Prudential agent named Plante who was involved in whistle-blowing activities). "Prudential deposed Neary as part of its defense against a suit by Plante and then terminated Neary about one month later allegedly based on information Neary provided during that deposition." *Id.* The court concluded, "These facts undeniably raise a genuine issue of material fact in regard to Prudential's motivation for terminating Neary. On a motion for summary judgment, that is all the law requires." *Id.*

[361] *Id.* at 211 n.3 (emphasis added).

[362] Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998).

[363] *Id.* at 198.

[364] *Id.*

to this award.[365] On appeal, the Second Circuit reversed this judgment and vacated the award.[366]

When he was hired in 1973 as a salesman, Halligan signed an industry arbitration agreement.[367] In 1992, Halligan claimed that he was forced out of his job by a new CEO who discriminated against him because of age.[368] Halligan's claim was first presented at an arbitration hearing in October 1993, and hearings continued into 1995.[369] By then, Halligan's cancer prevented him from testifying.[370] After Halligan died, his widow continued the arbitration, and during these hearings, arbitrators were presented with "very strong evidence of age-based discrimination."[371] For example, just before his separation, Halligan ranked fifth among twenty-five salesmen.[372] His employer's main defense was that Halligan voluntarily retired. In March 1996, after extensive hearings, the arbitrators denied all claims made by the Halligans. The award recited the claims and defenses of each party, but contained no explanation or rationale.

In reviewing the award for manifest disregard of the law, the court observed that "the reach of the doctrine is severely limited."[373] Halligan contended that "the NASD has undue influence here."[374] The court declined to rule on this complaint but narrowed its attention to the common practice in individual employment arbitrations of failing to provide an explanation in the award.

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[365] *Id.*

[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.* The Second Circuit recited this evidence at length (noting that although Halligan ranked first in the firm in sales from 1987 through 1991, and had always been among Piper's top salesmen, he was subjected to repeated discriminatory statements by upper-level management, such as "you're too old . . . [and] our clients are young and they want young salesmen," and "we want you out of here quickly.") *Id.* at 198–99.

[372] *Id.* at 198.

[373] *Id.* at 202 (quoting Government of India v. Cargill, Inc., 867 F.2d 130, 133 (2d Cir. 1989)). In the Second Circuit, manifest disregard "clearly means more than error or misunderstanding with respect to the law." *Id.* The court stated that in order to modify or vacate an award for manifest disregard, it "must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Id.* (citing DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997)).

[374] *Id.* Halligan criticized the industry's exclusive control over NASD's Code of Arbitration Procedure. The court also provided a detailed explanation of these procedures. *Id.* at 202–03.

Applying the manifest disregard standard to this facet, the court remarked that "Halligan presented overwhelming evidence that Piper's conduct . . . was motivated by age discrimination."[375] The Second Circuit reasoned: "In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both."[376] The court added, "Moreover, the arbitrators did not explain their award."[377]

In reaching this result, the court declined to state a broad rule that requires arbitrators to explain their awards.[378] Instead, it offered this guidance:

> We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard.[379]

The Second Circuit also based its reasoning on assumptions made by the Supreme Court in *Gilmer*.[380] After stating that "[t]his case puts those assumptions to the test,"[381] the court concluded that "[h]ad the arbitrators offered

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[375] *Id.* at 203.

[376] *Id.* at 204.

[377] *Id.*

[378] *Id.* ("It is true that we have stated repeatedly that arbitrators have no obligation to do so."). In this vein, it is interesting to consider Justice Douglas' thoughts on this a generation ago in the *Trilogy*: "To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) (citation omitted).

[379] *Halligan*, 148 F.3d at 204.

[380] *Id.* The *Halligan* court recalled,

> [T]he Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, [but] the Court did so on the assumptions that the claimant would not forgo the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in the arbitration.

Id. (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

[381] Observing that *Gilmer* stated that procedural inadequacies in arbitration are best left for resolution in specific cases, the Second Circuit noted, "At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be

[an] explanation of the award, on this record it would have been extremely hard to accept—but they did not do even that."[382]

VI. CONCLUSIONS

The Supreme Court's 2000–2001 term showed a continuing emphasis on promoting workplace arbitration. In three pertinent decisions, the Court strengthened the autonomy of these private ADR systems. *Eastern* provided the federal courts a reinforcing signal to avoid vacating labor arbitration awards that appear to conflict with a public policy. Unless an award directly conflicts with a positive law, for example, by reinstating an employee when a statute or other positive law expressly forbids employment of a person who breaks a rule or law, courts are to confirm an arbitrator's decision.[383] *Garvey* bolstered the *Trilogy* message that "courts . . . have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.'"[384] *Circuit City* instructed federal courts to enforce employment arbitration agreements in the private and mostly nonunion segment of the workforce.

Our empirical research captures the most detailed images of these evolving ADR systems. These pictures lead us to the following conclusions.

A. *The Labor-Management Model*

Our overriding conclusion is that most critics of the judicial review of labor arbitration awards fail to give federal courts due credit for their continuing adherence to the *Trilogy*.

1. Considering all types of challenges to labor arbitration awards, the results here show that courts behave consistently. The confirmation rates by district and appellate courts respectively from 1960–1991 were 71.8% and 70.5%.[385] The overall confirmation rates observed here are almost the same.[386] These figures tell the most important story about judicial review of labor arbitration awards: federal district courts have consistently enforced awards since the *Trilogy*.

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taken into account." *Id.* at 204. The court stated, "[W]e are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both." *Id.*

[382] *Id.*

[383] E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 63 (2000).

[384] Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724,1728 (2001) (quoting United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987)).

[385] *See supra* Section IV, at p. 50 tbl.1 bottom.

[386] *Id.*

2. For public policy challenges to awards, there is too much emphasis on a few precedents that arguably depart from the *Trilogy*. The 72% award confirmation rate by district courts from 1991–2001 in public policy cases is a significant improvement compared to previously published results for earlier periods (54.7% confirmation rate in 1960–1981, and 55.3% in 1982–1987).[387] The confirmation rate found for the brief period following *Misco* (69.5% for 1988–1991) remained nearly constant in this study.[388] The fact that appellate courts from 1991–2001 confirmed awards at nearly the same rate as district courts (73.2%)[389] adds to the evidence of impressive consistency by the courts. Nevertheless, our analysis of three Exxon Corporation decisions[390] suggests why the Supreme Court issued another cautionary decision in *Eastern*. After the Exxon *Valdez* disaster, caused by a drunken helmsman, courts have been torn between unusually difficult choices: adhere very closely to the guidance and spirit of *Misco*, or give practical effect to a variety of laws that aim to protect co-workers, communities, and the environment from extraordinary safety risks.

3. This study empirically validates the claim that some courts fail to adhere to the deferential standards of the *Trilogy*, but pinpoints the problem in the South. The Fourth and Eleventh Circuits have abnormally low confirmation rates and appear to act upon unarticulated regional norms. In the Eleventh Circuit, for example, eleven out of eleven appealed awards favored unions, but only 28% ultimately survived review by both the district and appellate courts.[391] District courts in the Sixth and Eighth Circuits, some of which are in the South, had similar confirmation rates. In the Fifth Circuit, district courts had confirmation rates in the appropriate range, but the appellate court had an abnormally low rate.

In sum, a comparison of circuits that are completely or partly in the South with all others shows a distinct regional pattern, with courts in the former confirming awards below the acceptable range.[392] They also distorted the national award confirmation rate. Removing these five Southern Circuits (the Fourth, Fifth, Sixth, Eighth, and Eleventh), in which district courts confirmed sixty-three awards in one hundred twelve cases for an enforcement rate of 56%, district courts in the rest of the nation confirmed one hundred awards in one

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[387] LeRoy & Feuille, *supra* note 155, at 106 tbl.6. In this earlier study we examined outcomes for 1982–1987 to determine if President Reagan's appointments to the bench altered the award confirmation rate, but found no effect. *Cf.* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995).

[388] LeRoy & Feuille, *supra* note 155, at 106.

[389] *See supra* Section IV, at p. 52 tbl.2.

[390] *See supra* notes 257–89.

[391] *See supra* Section IV, at p. 50 tbl.1.

[392] *Id.*

hundred twenty cases for an enforcement rate of 83%. The same comparison at the appellate level shows that Southern Circuits confirmed forty-three awards in seventy-three cases for an enforcement rate of 59%, while courts in the rest of the nation confirmed thirty-four awards in forty-three cases for an enforcement rate of 79%.

This distinct regional difference compounds a geographic bias against unions—the right-to-work amendment—that Congress embedded in the Taft-Hartley Act.[393] The same 1947 legislation that led to judicial oversight of collective bargaining agreements also stimulated Southern states to enact or amend right-to-work laws.[394] This legislation, which outlawed compulsory union dues,[395] combined with this region's apparent aversion to labor unions and its lower labor costs to promote employer relocation of operations to the South.[396]

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[393] *See* Labor-Management Relations Act, 1947, ch. 120, § 14(b), 61 Stat 136, 151 (1947) (codified at 29 U.S.C. § 164(b) (1994)) ("Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."). On the surface, Republicans defended this amendment on grounds of states rights. *See* H.R. CONF. REP. NO. 510, on H.R. 3020, 80th Cong., 1st Sess. 15, *reprinted* in 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 (1959), at 564 (intent of legislation is only to effectuate existing state laws that prohibit compulsory union membership). A more realistic picture than the official one in the Conference Report appears in HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 326–29 (1950). They observed that the "major part of this legislation in 1947 still came from the South and Southwest . . . ." *Id.* at 329.

[394] As of 1995, twenty-one states enacted right-to-work laws (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming). *Right-to-Work Laws: Efforts to Enact Right-to-Work Laws Heat Up in 1995 State Legislatures*, 52 Daily Lab. Rep. (BNA) C–2 (Mar. 17, 1995). For a study on the impact of this legislation, see Gasper A. Garofalo & Devinder A. Malhotra, *An Integrated Model of the Economic Effects of Right-to-Work Laws*, 13 J. LAB. RES. 293, 299 (1992) (concluding right-to-work laws reduced unionization rates by one-third).

[395] An insightful study explains,

> Right-to-work laws strike at unions' main resource, dues. If all workers within a bargaining unit always sought membership and willingly paid their dues, right-to-work laws could have little significance for collective bargaining. American workers have not been noted, however, for their whole-hearted devotion to, and voluntary support of, unions.

James W. Kuhn, *Right-to-Work Laws—Symbols or Substance?* 14 INDUS. & LAB. REL. REV. 587, 588 (1961).

[396] *See* Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 482 (1988) ("Because of both historical antiunion sentiment and the prevalence of state 'right-to-work' statutes — which prohibit

Our findings imply that judicial review of arbitration awards adds to union-avoidance benefits for employers in the South. These results also suggest that it is not coincidental that much of the Supreme Court's labor arbitration jurisprudence originated in Southern federal courts (Tennessee,[397] West Virginia,[398] Alabama,[399] Mississippi,[400] Louisiana,[401] and again, West Virginia).[402]

4. In contrast to the arbitration-award literature, we are able to compare vacatur and confirmation decisions to similar forms of judicial behavior. Our findings of award confirmation rates for the current and earlier periods of analysis altogether, fluctuating narrowly from the upper-sixty to lower-seventy

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the negotiation of union security arrangements — the labor movement will probably find it arduous to organize workers in the south and southwest regions of the country.") (footnote omitted); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 70 (1994) ("One of the best guarantees for keeping a plant unorganized was to locate it in a southern state.").

[397] The arbitrability case in the *Trilogy* was first heard by the District Court of Eastern Tennessee, where that court ruled that the union's grievance was not arbitrable. United Steelworkers v. Am. Mfg. Co., 264 F.2d 624 (6th Cir. 1959) *rev'd*, 363 U.S. 564 (1960).

[398] The discipline case in the *Trilogy* was heard by the District Court of West Virginia, which confirmed an arbitrator's award that reinstated discharged employees. Enterprise Wheel & Car Corp. v. United Steelworkers, 168 F. Supp. 308 (D.C .W. Va. 1958). The Fourth Circuit reversed this ruling and effectively vacated the award in Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327 (4th Cir. 1959).

[399] The contract interpretation case in the *Trilogy* was heard by the Southern District Court of Alabama, which ruled that the employer had a right to subcontract work under the management rights part of the labor agreement. United Steelworkers of America v. Warrior & Gulf Navigation Co., 168 F. Supp. 702 (S.D. Ala. 1958). The Fifth Circuit affirmed this vacatur ruling in United Steelworkers v. Warrior & Gulf Navigation Co., 269 F.2d 633 (5th Cir. 1959), *rev'd*, 363 U.S. 574 (1960).

[400] The Supreme Court's first public policy labor arbitration case was initially decided by the Northern District Court of Mississippi in an unreported case. *See* W. R. Grace & Co. v. Local Union No. 759, Int'l Union of United Rubber Workers, 652 F.2d 1248 (5th Cir. 1981). The district court set aside the award and granted relief to the employer, but this ruling was reversed by the Fifth Circuit.

[401] The Supreme Court's second public policy labor arbitration case was initially decided by the Western District Court of Louisiana. *See* United Paperworkers Int'l Union v. Misco, Inc., 768 F.2d 739 (5th Cir. 1985). The district court denied enforcement of the award, and the Fifth Circuit affirmed this vacatur.

[402] The Supreme Court's third and most recent public policy labor arbitration case departs from the regional pattern of judicial interference with awards. The Southern District Court of West Virginia confirmed the award in *Eastern Associated Coal Corp. v. United Mine Workers, District 17*, 66 F. Supp. 2d 796 (S.D. W. Va. 1998), and its ruling was affirmed by the Fourth Circuit in *Eastern Associated Coal Corp. v. United Mine Workers, District 17*, 188 F.3d 501 (4th Cir. 1999).

percent range, is consistent with federal court behavior in reviewing NLRB order and patent verdicts.[403] This comparison improves on current arbitration research, not only because it is based on data rather than conjecture, but also because it shows that when judges review rulings of presumed subject matter experts, they face the paradox of deferring to this expertise while insuring that specialized tribunals act within the bounds of external laws. We conclude that the conventional wisdom exaggerates court interference with labor arbitration awards. This view not only lacks statistical evidence, but overstates the problem of judicial review as an institutional attack on the primacy of arbitrator jurisdiction.[404]

We also caution that our empirical findings do not mean that federal courts would confirm about 70% of the entire universe of arbitration awards. That would falsely assume that any time an employer or union loses an arbitration award, they appeal the outcome.[405] As Karl Llewellyn once remarked, litigated cases bear the same relationship to the underlying pool of disputes "as does homicidal mania or sleeping sickness to our normal life."[406] In short, award appeals are rare cases precisely because most parties abide by the promise to accept the arbitrator's award as final and binding. If these extraordinary appeals contain a disproportionate share of flawed rulings by arbitrators, then it follows that our empirical measures reflect a high degree of court deference to labor arbitration.

B. *The Individual Employment Model*

Although the individual employment arbitration system substantially differs from the labor-management model, our main conclusion has a similar theme. Although courts substantially defer to arbitrator rulings, more judges are stringently reviewing awards in these arbitrations. In time, we believe they will behave more like courts in the labor-management domain. More specifically, our research leads to these conclusions:

1. Certainly, the confirmation rates for the individual employment cases are higher than labor-management cases (compare 70.3% and 66.4% respectively for

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[403] *See supra* notes 178–82.

[404] *See supra* notes 147–48.

[405] For a general discussion of expectancy theory suggesting that trials do not reflect the universe of all disputes, see Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1568 (1989).

[406] KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 58 (2d ed. 1951).

district and circuit courts reviewing labor arbitration awards,[407] and 85.3% and 81.3% for the district and circuit courts that reviewed individual employment awards).[408] But our research shows that the confirmation rate has begun to drop for the individual cases. These data are preliminary and subject to the usual caveats about small sample size and missing information, but consider that from 1991 to 1996 district courts decided only six award-challenge cases and confirmed the award each time. However, during 1997–2000 (we found no reported district decisions as of March 31, 2001), these courts confirmed awards in fourteen out of seventeen cases (82.4%).[409] In sum, we suggest that the similarities in confirmation rates across these two systems are noteworthy. This is especially so if the comparison eliminates district courts from circuits that are totally or partly located in the South (compare 85% confirmation rate for individual employment cases, and 83% for labor-management awards).[410]

2. If judicial review of individual employment awards were limited to standards expressly enumerated in the FAA,[411] this function would be reasonably straight-forward. However, this review is more complicated, and at the same time less anchored in a coherent body of law, than labor cases. Often, courts consider a large complex of statutory standards under the FAA and also non-statutory standards.[412] There is no detectable rhyme or reason in a court's choice of one set of standards over others. Furthermore, courts concede that standards such as manifest disregard of the law are poorly defined.[413] Finally, since the FAA applies to a wide variety of dispute settings, many of which have nothing to do with the special characteristics of the employment relationship,[414] the review of

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[407] *See supra* Section IV, at p. 52 tbl.2.

[408] *See supra* Section IV, at pp. 54–56 tbl.3.

[409] Unfortunately, we were not able to determine the year of the district court ruling in the remaining eleven cases decided at this level (these cases were reported only as circuit court decisions, and the appellate court's opinion did not provide enough information to determine the date of the district court decision).

[410] *See* Section VI.A., Point 3.

[411] *See* LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2, 5 (2000).

[412] *See* Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000). Plaintiff's challenge of award claimed (1) that the arbitration clause failed because it was vague, (2) that the arbitration clause was so broad as to exceed § 2 of the FAA, (3) that any agreement to arbitrate was voided because the specified procedure no longer existed, (4) the Company waived its right to arbitration by its reorganization of the company and its failure to raise the arbitrability of the claims with the EEOC, and (5) that the award was arbitrary and capricious and evidenced a manifest disregard for the law. *Id.* at 1221–23.

[413] *E.g.*, *LaPrade*, 94 F.Supp 2d at 5 ("[C]ontours of the manifest disregard standard are nebulous.").

[414] *E.g.*, *LaPrade*, 94 F. Supp. 2d at 8; Sobol v. Kidder, Peabody & Co., 49 F. Supp. 2d 208, 223 (S.D.N.Y. 1999) (in judging whether arbitrator misconduct warranted vacatur

individual employment claims appears to suffer from this lumping effect. In particular, we note the contrast between these types of review and those conducted in the *Trilogy*, where the Supreme Court demonstrated particular sensitivity for the common law of the shop—an industrial code that defines expectations and norms for employers and workers.[415] In our view, the Supreme Court will eventually recognize the need to establish judicial review standards for the arbitration of individual employment rights in the same way it fashioned a federal common law for enforcing collective bargaining agreements in the *Trilogy*.

3. Our database also provides some information about the speed and efficiency of this dispute resolution process. While some cases fit the prototype of a short, inexpensive and therefore accessible process,[416] others functioned worse than court adjudications.[417] It appears that when employment arbitrations fail to deliver on their reputed advantages over civil trials, courts invest less faith in this ADR process. More searching review of the arbitration award is likely to follow in these situations.

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under § 10(a) of the FAA, the court cited Areca, Inc. v. Oppenheimer & Co., Inc., 960 F. Supp. 52, 54–55 (S.D.N.Y. 1997), a dispute between investors and a brokerage firm); Chisolm v. Kidder, Peabody Asset Mgmt., 966 F. Supp. 218, 222 (S.D.N.Y. 1997) *aff'd*, 164 F.3d 617 (2d Cir. 1998) (in applying the FAA, the court cited Carte Blanche (Sing.) v. Carte Blanche (Int'l), 888 F.2d 260, 264–65 (2d Cir. 1989), a dispute between a credit card services franchisee and franchisor).

415 *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–79 (1960), where the Court saw a fundamental contrast between labor and commercial arbitration:

> Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.
>
> The collective bargaining agreement states the rights and duties of the parties. . . . [i]t is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It calls into being a new common law—the common law of a particular industry or of a particular plant."

Id.

416 Ahing v. Lehman Bros., No. 94 Civ. 9027, 2000 WL 460443 (S.D.N.Y. Apr. 20, 2000).

417 Mayes v. Lanier Worldwide, Inc., 115 F. Supp. 2d 1330, 1337 (M.D. Ala. 2000) (nine hearing days); *LaPrade*, 94 F. Supp. 2d at 7 (seventy-four hearing dates and conferences from 1993–1999); *Sobol*, 49 F. Supp. 2d at 213 (sixty-two hearing days from 1994–1998); *Chisolm v. Kidder, Peabody Asset Mgmt.*, 966 F. Supp. at 220–21 (forty-three hearing days from 1992–1996).

4. We have too little data to conclude that there are regional differences in confirmation rates for individual employment awards. Nevertheless, our results imply that courts in the First and Second Circuits are poised to play a leading role in developing a federal common law for these awards.[418] We base this prediction on the fact that more precedents are now in place in these circuits to enable future courts to vacate awards. Here, we also note that courts in these circuits have been among early courts in the nation to adopt more expansive theories of employer liability in discrimination cases.[419] We hypothesize a positive correlation between a circuit's adoption of more expansive theories of employer liability, and its tendency to vacate awards that result from employer designed and imposed dispute resolution systems that a judge believes is unfair.[420]

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[418] We base this preliminary conclusion on Finding I. *See supra* Section IV.

[419] For example, the First Circuit Court of Appeals, in the still controversial area of whether a court should consider sexual harassment in a Title VII lawsuit from a woman's perspective, endorsed this view in 1988. *See* Lipsett v. Univ. of P.R., 864 F.2d 881, 898 (1st Cir. 1988) ("Unless the fact finder keeps both the man's and the woman's perspective in mind, 'defendants as well as the courts [will be] permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders . . . .'"). Although the Second Circuit subscribes to the widely accepted legal principle that harassment must be sufficiently severe or pervasive to alter the conditions in order to support a hostile-work environment claim, it took a liberal view of this matter as early as 1989. *See* Carrero v. N.Y. City Hous. Auth., 890 F.2d 569 (2d Cir. 1989):

> A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII. It is not how long the sexual innuendoes, slurs, verbal assaults, or obnoxious course of conduct lasts. The offensiveness of the individual actions complained of is also a factor to be considered in determining whether such actions are pervasive.

Id. at 578.

[420] To be clear, we underscore our sense that this hypothesis needs empirical testing before any firm conclusions can be reached. Moreover, we note that is quite possible that a circuit that exhibits a tendency to vacate an unusually high percentage of pro-union awards may behave differently where individual employment claims are asserted. In this regard, we call attention to a pertinent Fourth Circuit decision which is seemingly uncharacteristic of this conservative court. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999). There the court refused to enforce a *Gilmer*-type employment arbitration agreement because the arbitration system imposed on the complainant by Hooters was "egregiously unfair." *Id.* at 938. The court reasoned,

> We hold that the promulgation of so many biased rules especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties. . . . By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.

Id. at 940.

C. *Conclusions and Predictions*

We conclude by taking a long term view of the relationship between federal courts and workplace disputes. Our research shows that private justice resides in the shadow of public courts, for the judiciary displays considerable—but definitely not unlimited—deference to the decisions of private arbitrators. In the unionized sector our research strongly suggests that the existing judicial review equilibrium—only a tiny slice of awards are appealed, and the courts vacate less than a third of these challenged awards—will continue. Our research provides almost no support for claims that the federal courts are increasingly undermining the finality of the labor arbitration process.

Individual employment arbitration also operates in substantial autonomy. This is evident in the current move by many nonunion employers to embrace employment arbitration as a means to avoid litigation over workplace disputes. The Supreme Court legitimated this trend in *Gilmer* and again in *Circuit City*. As a consequence, employers can be reasonably confident that courts will enforce the awards produced via their arbitration agreements.[421] At the same time, our research shows that federal judges will vacate those awards they believe to be the product of unfair arbitration procedures or seriously improper arbitrator decision making. These vacatur decisions are one of the factors encouraging employers to improve the fairness of their compulsory arbitration systems.[422] These decisions may also embolden individual complainants who lose their arbitration claims to scrutinize arbitrators more closely.[423] In sum, just as the shadow of judicial oversight has fostered a healthy mix of autonomy and public accountability for

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[421] *But see id.*

[422] *See* Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35299 (June 29, 1998) (as of January 1, 1999, NASD member employers are no longer required to impose pre-dispute arbitration agreements on associated securities dealers); Notice of Filing of Proposed Rule Changes by New York Stock Exchange, Inc. Relating to Arbitration Rules, 63 Fed. Reg. 52782 (Oct. 1, 1998) (N.Y.S.E. has proposed that it would no longer make its arbitration system available to hear employment discrimination cases, unless the parties agree to arbitration after the dispute has arisen).

[423] *See* Sobol v. Kidder, Peabody & Co., 49 F. Supp. 2d 208, 223 n.20 (1999) (in alleging bias, plaintiff cited the arbitrators' track record of awarding low damages, as well as criticism of the NASD for its partiality in selecting arbitrators); *see also* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 206–12 (D. Mass. 1998) (mem.), *aff'd on other grounds*, 170 F.3d 1 (1st Cir. 1999) (refusing to compel arbitration of Title VII sex discrimination claim due to institutional bias); *cf.* York Research Corp. v. Landgarten, 927 F.2d 119, 122 (2d Cir.1991) (rejecting charge of arbitral bias that was raised after the rendering of an unfavorable award).

labor arbitration, judicial review of individual employment arbitration awards is slowly but surely moving this newer dispute resolution system in the same direction.